No. 10688.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GILFILLAN BROS., INC.,

Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT, GILFILLAN BROS., INC.

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Statement of the Case.

Petitioner's statement of the case is correct as far as it goes. It fails, however, to set forth certain matters which we deem pertinent.

The complaint filed by petitioner made four charges against the respondent:

First, that respondent sponsored, promoted, encouraged, assisted and interfered with the formation of the Association,[1] in violation of Section 8(2) of the Act.[2]

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[1]Throughout this brief the Employees Mutual Association will be referred to as the "Association"; the International Association of Machinists as the "I.A.M." or the "Union"; and respondent as "Gilfillan" or the "Company."

[2]Throughout this brief the National Labor Relations Act (Act of July 5, 1935, c. 372, 29 U. S. C.) will be referred to as the "Act." The pertinent sections of the Act are set forth in Appendix A.

Second, that respondent interfered with the administration of the Association and contributed support thereto, in violation of Section 8(2) of the Act.

Third, that respondent did, in February, 1943, discharge certain named employees because of their membership in and activity on behalf of the Union, and did thereby discriminate in regard to the hire and tenure of employment of said employees, and did thereby discourage membership in the Union, all contrary to Section 8(3) of the Act.

Fourth, that respondent, through its officers and agents, had, contrary to Section 1 of the Act, coerced and restrained its employees in the exercise of the rights guaranteed in Section 7 of the Act, and had thereby engaged in unfair labor practices within the meaning of Section 8(1) of the Act, and had discriminated against the Union by making derogatory and uncomplimentary statements to employees regarding the Union; by stating to employees that Union membership would not serve to better their wages or conditions of employment; that membership would in fact render such conditions less favorable; by referring to members and officials of the Union as racketeers and undesirable foreigners; by threatening to cancel smoking and other privileges and to reduce or eliminate overtime work; and by denying the privilege of the Company's bulletin boards to the Union, although permitting the use of its bulletin boards by the Association without limitation or restraint [R. 8-10].

The Trial Examiner found that the first and second charges were supported by substantial evidence, but found that there was no evidence to support the third charge, that respondent had discriminately discharged its employees, or TO SUPPORT THE FOURTH CHARGE OF DISCRIMINATION AGAINST THE UNION[3] [R. 52-53].

The Board by its decision and order adopted the findings of fact and conclusions of the Examiner, subject only to the statement *that no single fact* set forth in the Intermediate Report, *considered alone,* justified the conclusion that the Association was Company-dominated, but that under all of the circumstances, taken together, including particularly the financial assistance given by the respondent to the Association, the activity of leadmen (particularly Margaret Goebel) in behalf of that organization, and the circumstances leading to and surrounding the execution of the 1943 contract, it found that the Association was so dominated [R. 85].

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[3]The fact that the Trial Examiner (his findings are adopted by the Board) has found that there was no evidence to support the only charges of discrimination which are set forth in the charge or alleged in the complaint is a factor to be considered by this court in determining whether or not other facts found support the finding of domination of and interference with the Association (*N. L. R. B. v. Citizen-News Co.* (C. C. A. 9), 134 F. (2d) 970, 973).

Outline of Argument.

There is no evidence to support the finding of the Board that respondent promoted, dominated and interfered with the formation of the Association.

By reason of the rider to the Appropriation Act of 1944 the Board was without power to make and enter the order which it here seeks to enforce.

There being no evidence that respondent had any part in the formation of the Association, the Board is precluded by the rider to the Appropriation Act of 1945 from seeking enforcement of the order made in violation of the rider to the 1944 Act.

Inasmuch as the Board has proceeded in making its order and seeking enforcement thereof contrary to the expressed will of Congress and through the illegal expenditure of the funds appropriated to the Board, it does not come into this court with clean hands, and the court should refuse to enforce the order.

The evidence shows without conflict that respondent has at all times been neutral and impartial and has not interfered with its employees in the exercise of their rights granted them under Section 7 of the Act.

The acts of minor supervisory employees designated "leadmen", who were members of the Association, were not coercive in character and are not attributable to respondent.

The order is so broad in its scope that it exceeds the power of the Board.

Argument.

(Italics ours unless otherwise noted.)

As we have hereofore pointed out, the Board held that there was no single fact found by the Trial Examiner to be true which would justify the conclusion that respondent dominated the Association, but held that the aggregate of all of the facts shown by the record justified that conclusion.

By its brief filed herein petitioner seeks, by a narration of certain probative facts which the Trial Examiner found to be true, to sustain the ultimate fact found by the Trial Examiner and the Board, that the Association was Company-dominated and that, therefore, its order for disestablishment of the Association and the vitiation of respondent's contract therewith is justified.

In this brief we shall show that, in the light of the background established by the whole record, the probative facts found by the Trial Examiner to be true do not support the ultimate fact of Company domination. We shall further show that there is no evidence to uphold certain of the findings of the Board upon the probative facts.

Before analyzing the specific facts found by the Trial Examiner to be true and the evidence which is claimed as the basis for those findings, we will set forth the background shown by the record against which those facts must be viewed. For, as is said by this court in *National Labor Relations Board v. Union Pacific Stages*, 99 F. (2d) 153, 171:

> "To arrive at correct conclusions we must examine the facts in their proper setting."

or as the proposition is stated by another court,

> "In making such an analysis of the evidence in a case such as the one before us the evidence relied on by the Board should be considered in the light of the general background of labor conditions prevailing in the petitioner's plant."
>
> *Quaker State Oil Refining Corp. v. National Labor Relations Board* (C. C. A. 3), 119 F. (2d) 631, 632.[5]

BACKGROUND.

The facts which constitue the background against which the facts relied upon by the Board must be judged, as shown by the evidence or which must be assumed for want of evidence to the contrary, are:

Prior to 1941, respondent had been engaged in the business of manufacturing radio receiving sets and refrigerators, employing at the peak of its production seasons not over 300 people, and during its slack seasons about 140 [R. 173].

On November 30, 1940, respondent's plant was completely destroyed by fire. It was rebuilt, and upon its being rebuilt the conversion of the plant from the production of radios and refrigerators to the production of war materials at once commenced, and shortly the plant was entirely given over to the production of war materials.

Prior to 1937, there had been no labor organization of any kind in respondent's plant. Early in 1937, a group of respondent's production employees conceived the idea

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[5]See also: *Jefferson Electric Co. v. N. L. R. B.* (C. C. A. 7), 102 F. (2d) 949, 955-956; *N. L. R. B. v. Sun Shipbuilding & Dry Dock Co.* (C. C. A. 3), 135 F. (2d) 15, 21.

of forming a union of the employees in the respondent's plant [R. 170]. This resulted in the formation of the Association at about the same time the C. I. O. attempted to organize these same employees [R. 189]. There is no evidence that during the resulting race between the Association and the C. I. O. for members, respondent in anywise exhibited any preference for one of the rival organizations as against the other, or assisted either in its drive for members.

On May 1, 1937, the C. I. O. filed a petition for certification of representatives pursuant to Section 9(c) of the National Labor Relations Act. Pursuant to that petition an election, consented to by respondent, was held and was won by the Employees Mutual Association, and as a result the Association was certified as the collective bargaining agent of respondent's employees [R. 342]. Respondent then, as required by the Act, negotiated with the Association and entered into a contract with it. New contracts were negotiated each year.[6]

From May, 1937, to 1943, there was no labor activity in the sense of organizational drives by labor unions at respondent's plant. On about January 10, 1943, the charging union commenced its organizational efforts at the plant [R. 307].

There have never been any labor troubles in respondent's plant, and *there is not a single word in the record*[7]

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[6]Only the contracts of 1942 and 1943 are contained in the record [see R. 432, 443, 582].

[7]Any want of evidence is not due to the Board's lack of opportunity to secure it, as it was stipulated that respondent gave to the Board every opportunity and facility to interview employees and to examine all records [R. 609].

that respondent at any time by word or deed indicated any antagonism towards the Union or the C. I. O., or any preference for the Association, or adopted anything but a neutral and impartial attitude in the contest between the Association and the C. I. O. in the first instance, and the Association and the I. A. M. in the second. On the contrary, the evidence shows without conflict that the Union and the Association were granted equal privileges within respondent's plant in their attempts to induce respondent's employees to select their organization as the bargaining agent for the employees; that the Union openly maintained within respondent's plant, without opposition from respondent, a committee charged with the duty of soliciting, and who did solicit, Union members within the plant [R. 196, 199, 205-206, 307-311]; that one of the members of this committee wore a badge designating him as a Union steward within the plant, and that other members of the committee and a substantial number of other employees wore Union badges at work, and the respondent neither objected to these actions nor discriminated against these employees [R. 196, 199, 308, 311]. During its organizational drive the Union was permitted to and did use respondent's bulletin boards and the inside walls of the plant to post and keep posted literature soliciting memberships in the Union, announcement of Union meetings (to which all employees were invited in order to induce them to choose the A. F. of L as their bargaining agent) and even a letter signed by an officer of the Union charging

respondent with unfair labor practices and stating "that the 'Employees Mutual Association' is not, in fact *or in the view of the Board,* the agent of the employees."[8] [R. 216-217; 219-222; 416-429.]

There is no evidence whatsoever that any officer, superintendent, foreman, or even leadman, in respondent's employ ever uttered any threats or coercive statements to any employee in an attempt (or at all) to induce the employee either to join the Association or not to join the Union.

It is against this background of complete neutrality and impartiality on the part of respondent and of equal and unfettered opportunity on the part of both the Union and the Association to present the merits of their organizations as bargaining agent for the employees, and of unhampered opportunity to the employees to choose between the Association and the Union as their bargaining agent, that the facts found by the Board and relied upon by it to establish the ultimate fact that the Association is a company-dominated one, must be viewed.

The facts upon which the petitioner in its brief relies to support its petition for enforcement of its order fall into the following general classifications:

(1) That respondent promoted and encouraged the formation of the Association;

(2) Use of respondent's premises by the Association;

(3) The activities of leadmen;

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[8]Respondent was not permitted to prove either that the Board had prejudged this case, or that the italicized statement was false [R. 281-285].

(4) The execution by respondent in 1943 of a contract with the Association and the circumstances surrounding the execution of that contract;

(5) The holding of Association meetings off company premises but during working hours;

(6) A raise in wages given to certain women employees;

(7) Financial support of the Association.

The petitioner in its brief does not and cannot, in the face of the Board's order, rely on any one of these facts, but relies upon them collectively.

Formation of the Association.

The *only evidence* as to any participation by respondent in the formation of the Association is the testimony given by one Semple who, in the years 1937 to 1939, was a Cost Accountant and Personnel Manager for respondent. His testimony was brief and is set forth at pages 169 to 188 of the Record. The only fact to which he testified, which has any bearing on the formation of the Union, was his testimony that early in 1937 a group of employees asked his advice as to how to form a union, and that he told them that the only advice he could give them would be to go to the Public Library and get that information, that he particularly told them to get "Roberts' Rules of Conduct" [R. 174].

Certainly no finding of domination or interference with the formation of the Association could be based upon this bit of evidence. We cannot conceive how Mr. Semple

could have adopted a more neutral or less interfering attitude.

It has repeatedly been held that statements such as were made by Semple do not constitute a basis for or evidence of a charge of interference with the formation of an independent union.[9]

Petitioner implies (Br. pp. 4-5) that Semple arranged an organizational meeting of the E. M. A. on respondent's premises and that he insisted that the attendance at the meeting be confined to those "interested" in the Association. This is a misstatement or misconception of the evidence. Simple did arrange for and permit one meeting of the Association to be held in the plant. This was not an organizational meeting, nor was it open to those only "interested" in the Association, but was limited to those who were already members [R. 174-176]. The record is silent as to the date of this meeting and it cannot be determined from the record whether the meeting was held before or after the Association, in May of 1937, had been certified as the bargaining agent of the employees. It is clear, however, that this meeting had nothing to do with the formation of the Union, inasmuch as it was limited to the members of the Association, which presupposes that it had already been formed. The burden was upon the Board to show that this meeting was a part of the formation of the Association if it seeks to use the meeting as evidence that respondent took part in the formation of the Asso-

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[9] *E. I. Dupont de Nemours & Co. v. N. L. R. B.* (C. C. A. 4), 116 F. (2d) 388, 398-399; *L. Greif & Bro. v. N. L. R. B.* (C. C. A. 4), 108 F. (2d) 551; *Virginia Electric & Power Co. v. N. L. R. B.* (C. C. A. 4), 115 F. (2d) 414, 416-417, 419; *N. L. R. B. v. Mathieson Alkali Works* (C. C. A. 4), 114 F. (2d) 796, 799; *N. L. R. B. v. Union Pacific Stages* (C. C. A. 9), 99 F. (2d) 153, 178.

ciation, and the Board failed to sustain its burden of so proving.

We respectfully submit that there is not a scintilla of evidence to support the allegations of the complaint and the finding of the Board that the Company interfered with and promoted the formation of the Association, or to prove that the Association was anything more than the result of a spontaneous act of employees in the exercise of their rights under Section 7 of the Act.

After the Enactment of the Appropriation Act of 1944, the Board Was Precluded From Making Any Order Affecting the Contract Between Respondent and the Association, and by the Appropriation Act of 1945 Was Precluded From Seeking Enforcement of an Order Made in Violation of the 1944 Appropriation Act.

The National Labor Relations Board Appropriation Act of 1944 [see Appendix B, Petitioner's Br.] became effective July 1, 1943, during the hearing of this matter before the Trial Examiner. By the rider to this Act, which is set forth in Appendix B of Petitioner's brief, the Board was prohibited from using any of the funds appropriated in connection with a complaint case arising over an agreement between management and labor, which had been in existence for three months or longer without complaint being filed.

The record shows without conflict that at the time the charges herein were filed a contract between the Association and respondent had been in effect for nearly a year [R. 582-586], and that the renewal of that contract had

not yet been executed when the amended charges were filed.

Respondent repeatedly during the trial objected to the Board's proceeding and moved to dismiss the proceeding, basing its objections and motion upon the Appropriation Act of 1944 [R. 332-339, 411-412, 450]. The Board, nevertheless, proceeded with the hearing, the Trial Examiner made his findings and recommendations, and the Board entered the order of which it now seeks enforcement.

Upon a request by the National Labor Relations Board for a ruling, the Comptroller General of the United States ruled that the words "without complaint being filed" in the Act referred to the filing of a charge, not the filing of the complaint based upon the charge,[10] and further ruled that in a case such as the one at bar, where after the filing of a charge of unfair labor practices a new contract is entered into between a union and an employer and no amendment to the charge is filed within three months after the new contract is entered into, the Board is prohibited from proceeding under the original charge and ordering disestablishment of the alleged company-dominated union.[11] The Comptroller General further ruled that the Appropriation Act of 1944 prohibited the use of the funds appropriated, even though the union with which the em-

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[10]See p. 1, Appendix B.

[11]See "Case 3(c)," Appendix B.

ployer had contracted was formed in violation of Section 8(2) of the Act.[12] These rulings of the Comptroller General are conclusive upon the rights of the Board under the riders (*Skinner & Eddy Corp. v. McCarl,* 275 U. S. 1, 4-5, note).

The Board recognized this ruling of the Comptroller General as applicable to the present case, and because thereof moved this court to remand this case to the Board.[13] While this motion was pending, Congress passed the Labor-Federal Security Appropriation Act of 1945.[14] This Act also contained a rider, the substance of which we will hereafter note, but which was proposed as an amendment to the rider to the 1944 Act for the purpose of clarifying that rider, and continuing in effect its provisions limiting and curtailing the rights of the Board. Upon the Labor-Federal Security Appropriation Act of 1945 becoming effective, petitioner asked leave to withdraw its motion to remand, upon the ground that under that Act it was permitted to proceed because the Association here *was formed* in violation of Section 2 of the Act.[15]

By the Labor-Federal Security Appropriation Act of 1945, Congress provided that no part of the funds ap-

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[12]See "Cases 1, 2 and 3," Appendix B.

[13]See Motion to Remand, filed herein on the 2d day of May, 1944.

[14]See Appendix C, Petitioner's Brief.

[15]See telegram addressed to this court by Malcolm F. Halliday, Associate General Counsel for the Board, under date of July 1, 1944.

propriated should "be used in any way in connection with a complaint case arising over an agreement, or a renewal thereof," between management and labor, which had been in existence for three months or longer without complaint being filed by an *employee* or *employees* of such plant, with the proviso that the funds might be used in cases where the union which was a party to the contract *had been formed in violation of Section 8(2).*

In the case at bar, the Board proceeded with its hearing and entered its order in violation of the Appropriation Act of 1944. It has tacitly admitted as much by its motion to remand.

It is now attempting to enforce the order which it entered through an illegal use of public funds and in violation of the express purpose of Congress in enacting the rider to the 1944 Appropriation Act, despite the fact that there is no evidence to support its findings and assertion that respondent "dominated and interfered with the formaton * * * of the Association", and despite the fact that the charge herein was not filed by an employee or employees of respondent, but by a "raiding" union which is attempting to disrupt the existing relationship between respondent and the certified bargaining agent of its employees.

The Board in Administering the Act Must Do So in a Manner Which Will Accommodate and Effectuate the Policies of the Act With the Public Policy as Evidenced by Other Statutes.

In *National Labor Relations Board v. Thompson Products, Inc.* (C. C. A. 9), 141 F. (2d) 794, this court held that it was not the intent of Congress to amend the National Labor Relations Act so as permanently to deprive the Board of the right to prosecute complaint cases arising under Sections 8(1) and 8(2) of the Act.

It was, however, the intent of Congress to suspend the operation of the Act and the power of the Board to prosecute such cases during the time the Appropriation Act should be in effect, so as to stabilize labor conditions in industry and to prevent hindrance of the war effort through the disruption of contractual relations between employers and employees by the prosecution of unfair labor practice cases under Section 8(2) of the Act.

This intent is made clear by the statements of the proponents of the rider to the 1944 Act, quoted and referred to in *National Labor Relations Board v. Thompson Products, Inc., supra,* and if we understand the decision correctly is what this court declares the intent of Congress to have been.

That it was the intent of Congress to announce as the policy of Congress and the Government that the National Labor Relations Act should not be used during the present emergency to prosecute cases of this kind is made doubly clear by its having continued this limitation in effect through the passage of the rider to the 1945 bill and the statements of the proponents of that rider.

In reporting the 1945 Appropriations Bill to the House of Representatives, Congressman Hare stated in part as follows:

> "It will be recalled that with the hope of facilitating the work of this Board, curtailing the practice of raiding, obviating unnecessary friction in war plants, and thereby promoting maximum production, a provision was placed in the Appropriations Bill last year that where an agreement entered into between management and labor and no dissatisfaction had been or should be expressed within three months following the execution of the agreement, a limitation was placed on the appropriation for use by the Board to consider a complaint filed after the expiration of three months and during the life of the appropriation. * * * some criticism of the provisions arose. The committee, therefore, in its recent hearings afforded all interested parties an opportunity to appear with the idea that with the additional information the provisions might be *amended* so as to meet the objectives and remove any doubt as to the intention of the Congress. * * * and we now feel that the revised provision should *accomplish the original purpose* and meet with little or no criticism."
>
> 90 Congressional Record, 5191, May 29, 1944.

In reporting the 1945 Appropriation Bill to the House of Representatives, the committee made the following statement with regard to the rider to the bill:

> "A limitation was placed in the 1944 bill upon the expenditure of funds in consideration of complaint cases between management and labor on contracts that were in effect for three months. *The purpose of that limitation, as was clearly understood by the Con-*

gress at that time, was to promote production in the war effort; prevent unnecessary and unjustified raidings in war industrial plants, and the slowing down of production."

H. R. Report 1526, accompanying H. R. 4899, May 27, 1944.

In *National Labor Relations Board v. Thompson Products, Inc., supra,* the Board's order was made and the petition for its enforcement filed in this court long before the passage of the 1944 Appropriation Act, and this court held (141 F. (2d) 794) that there was nothing to indicate that *the purposes of the rider* would be effectuated by the inclusion of court proceedings within its scope where those proceedings were pending at the time of the passage of the Appropriation Act. That is not the situation in the case at bar. Here the Board proceeded with the hearing, the Trial Examiner made his intermediate report, and the Board made its order, after Congress, by the Appropriation Act, had suspended its power so to do.[16]

Congress having announced by the 1944 and 1945 Appropriation Act that as a matter of public policy labor conditions in war plants should be stabilized and not disrupted by proceedings such as the one involved in the case

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[16]Two things should be noted here: first, that the 1944 Act did not permit prosecution of complaint cases even though the union which was a party to the contract attacked was formed in violation of Section 2 [see Case 3(a), Appendix B]; second, that the Board by its order based its right to proceed solely on the contention that the 1943 contract between respondent and the Association, or the new contract, had not been in existence for three months without a complaint being filed [R. 86-87], a contention that was found (as we have heretofore shown) to be invalid by the Comptroller General and which was abandoned by the Board when it filed its notice to remand herein.

at bar, the Labor Board's power under the Act was limited to proceeding in such a manner as would harmonize with the public policy so announced by Congress.

In speaking of the power of the Board under the Act and its duty to harmonize the Act with the public policy as enunciated in other statutes, the Supreme Court, in *Southern S. S. Co. v. National Labor Relations Board*, 316 U. S. 31, at 46-47, 62 S. Ct. 886, 894, said:

> "This authorization[17] is of considerable breadth, and the courts may not lightly disturb the Board's choice of remedies. But it is also true that this discretion has its limits, and we have already begun to define them. (citing authorities) * * * It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."[18]

So, in the case at bar, it being the purpose of Congress that the Act should not be used to disrupt labor conditions by vitiating contracts between an employer and his employees through the disestablishment of one of the parties to that contract on the basis of charges by a raiding union of unfair labor practices, the Board was deprived

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[17] *National Labor Relations Act*, Sec. 10(c).

[18] See also *N. L. R. B. v. U. S. Truck Co.* (C. C. A. 6), 124 F. (2d) 887.

of the power to vitiate such contracts and order disestablishment of unions which it found to be company-dominated, but was left free to use other remedies to effectuate the purposes of the Act, such as to order the employer to cease and desist from interference with the union with which it had contracted (not including a prohibition against contracting with that union) or to order the reinstatement of employees discriminatorily discharged.

The Board Comes Into This Court With Unclean Hands.

The Board comes before this court in but one of its capacities, that of a party litigant. As such it asks this court to use its equity power to enforce an order made and entered by it contrary to the express will and declared purpose of Congress, and which could only have been made through the illegal use of funds appropriated to it. When the order was made it had no right to use its funds to proceed with the hearing and make its findings and order, even though the respondent had taken a part in the formation of the Association contrary to the provisions of Section 8(2) of the Act. But even if in such a case it might have proceeded under the 1945 Appropriation Act, despite its original wrongful act, there are no facts here to support its finding and contention that the respondent did have any part in the formation of the Association.

The Board, therefore, does not come before this court with clean hands, and this court will not lend itself to the accomplishment of the purposes of the Board to proceed

despite the declared policy and purpose of Congress that it should not proceed, nor will it aid the Board in the enforcement of an order which was made, and can only be enforced, through the illegal expenditure of the funds appropriated (*Morton Salt Co. v. Suppiger*, 314 U. S. 488, 62 S. Ct. 402; *Maltz v. Sax* (C. C. A. 7), 134 F. (2d) 2; *Bell & Howell Co. v. Bliss* (C. C. A. 7), 262 F. 131, 134-135).

It will undoubtedly be argued by the Board that respondent may not challenge the Board's use of its funds because respondent has suffered no direct injury not suffered by the public at large and which is attributable to the unlawful and unauthorized expenditure by the Board of its funds, relying upon decisions of the Supreme Court, such as that in *Alabama Power Co. v. Ickes*, 302 U. S. 464, 478-480.

Such a contention is not sound in the case at bar. Here respondent is not asking affirmative action by this court in enjoining the Board in the use of funds appropriated to it. Nor, if the court upholds our contention that the Board is not here with clean hands, is it called upon to take any affirmative action. It is only called upon to refuse to act in aid of a clearly illegal expenditure of public funds and a clear attempt by the Board to exercise its powers contrary to the expressed will of Congress. Further, respondent here is suffering a direct and private injury. The order of the Board that respondent disestablish the Association and dishonor its contract with the respondent, is not directed at the public nor, is any member of the public bound to obey it or suffer, except incidentally, by it. It is directed solely at the respondent.

It cannot be argued that because the order is based on the finding of the Board that respondent was guilty of a violation of Section 8(2) of the Act, no legal right of respondent is infringed by the order, and that respondent cannot challenge the illegality of the Board's expenditure of its funds or assert that the Board comes here with unclean hands. Such a contention is not sound for two reasons:

First, respondent's contract with the Association was not one made against public policy or one which was wrongful in itself, but was only one which became unenforcible when the Board had found upon substantial evidence that such a contract deprived the employees of their free choice of a bargaining agent and should be disregarded in order to effectuate the purposes of the Act. When Congress took away from the Board temporarily the power to effectuate the purposes of the Act by proceedings and orders such as the ones here, it left respondent with the right to deal with its employees upon the basis of its contract, undisturbed by any order of the Board. When, therefore, the Board proceeded here in violation of the expressed will of Congress, respondent suffered a direct and private injury not suffered by the public, for it is its contractual relations, and not the contractual relations of any other person, that are affected by the order.

Second, the court is not limited in denying injunctive relief because of the unclean hand of a suitor, even though no legal right of the person against whom the relief is sought would be infringed if the relief were granted *(Morton Salt Co. v. Suppiger, supra; Maltz v. Sax, supra; Bell & Howell Co. v. Bliss, supra).*

It will further be argued that the Board's use of its funds is not subject to judicial review because such a review would burden the courts with "the minutiae of detail indigenous to accounting." That the Board has no right to use its funds in a case such as the one at bar has already been determined by the Comptroller General, and this court is not called upon to supervise any accounting between the Board and the Comptroller General, but is only called upon to apply the ruling of the Comptroller General to the admitted facts in the case at bar. The situation is no different than if a writ of mandate were sought from this court to compel the Board to exercise its power and to act upon a charge filed, where the Board answered that by the Appropriation Act, as interpreted by the Comptroller General, it was prohibited from expending its funds in investigating or acting upon the charge filed. In either such a case or the case at bar, the court is not called upon to determine how much money the Board shall spend or whether or not there is sufficient money in the appropriation to enable it to proceed. It is only called upon to hold that here the petitioner has proceeded, and is still proceeding, in direct violation of the Appropriation Acts and contrary to the ruling of the Comptroller General.

In support of its position that the propriety of the Board's expenditure of its approriation is not a matter with which this court can concern itself, the Board cites not only *National Labor Relations Board v. Thompson Products, Inc., supra* (which case clearly did not pass upon this question), but *National Labor Relations Board v. Cowell Portland Cement Co.*, which it states was decided by this court without opinion on September 9, 1943.

We do not know upon what grounds or upon what factual basis this court made its order in the *Cowell* case. We are advised, however, that counsel for the Board in *National Labor Relations Board v. Thompson Products, Inc.,* expressly withdrew its claim that that order of the court was applicable to a case such as the one at bar.[19]

Use of Respondent's Premises.

One of the matters upon which the Board relies to uphold its findings of respondent's interference with and domination of the Association is the use of respondent's premises by the Association for certain of its activities. These activities, with the exception of one Association meeting that was held on respondent's premises in 1938, consisted of the solicitation of membership in the Association and the collection of dues from members of the Association on the Company's premises. That the members of the Association did solicit other employees to join their Association and did collect dues from members upon respondent's premises, and that some of this activity took place during time for which the employees were paid by respondent, we do not deny.

There is no evidence that these activities were brought to respondent's attention, but assuming that it may be inferred that respondent knew of some of these activities, it still (in the light of other facts) cannot be inferred that by failing to object to this activity respondent was influencing or interfering with the Association or attempt-

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[19]See pages 2 and 3, Respondent's Supplemental Brief, *N. L. R. B. v. Thompson Products, Inc.,* Action No. 10383 in the files of this court.

ing to influence or interfere with its employees in their choice of a bargaining agent.

The evidence shows without conflict that respondent permitted the same kind of activities to be carried on in its plant by the members and committees of the I. A. M., and the evidence fails to show that the respondent ever adopted anything but a neutral and impartial attitude in regard to the choice by its members of a bargaining agent.

The evidence shows, as we have heretofore pointed out, that during the entire period when the I. A. M. was seeking to organize respondent's employees, it maintained a committee in respondent's plant, the head of which wore a button designating him as the Union steward, and that this committee solicited and obtained within the plant over 100 of the total of 138 members which were secured by the I. A. M.

The evidence further shows that respondent permitted the posting on the walls of its plant and upon its bulletin board announcements of I. A. M. meetings, and literature which solicited membership in the I. A. M., including membership applications and authorization cards [R. 216, 417-419, 421-423, 423-424, 426-430].

The Board has found that there is no evidence to support any of the specific charges of discrimination, which are contained in the charge and alleged in the complaint [R. 52-53].

There is no evidence in the record that respondent attempted in any way to interfere with or curb the I. A. M.'s activities. Petitioner asserts the contrary, basing its assertion on the fact that on *one occasion* a foreman stated

to an employee, who was soliciting for the I. A. M., that "that was one of the A. F. of L. rules that they were specifically told not to * * * (violate)" but it fails to call attention to the fact that no disciplinary action was taken against this employee, and certainly a statement by the foreman that solicitation was against an A. F. of L. rule did not show any objection thereto on the part of respondent.

In view of the uncontradicted evidence as to the activities of the Union, to which we have heretofore called attention, there is no basis for the assertion by petitioner that the activities of the I. A. M. were sporadic.

The evidence showing that respondent had at all times remained neutral and had at no time expressed any hostility to the Union or preference for the Association, the fact that respondent did not take affirmative action to keep the Association from soliciting dues and memberships within the plant, coupled with the fact that it took no action against the same activities on the part of the Union, fails to constitute any evidence of interference by the respondent, but on the contrary conclusively shows that respondent was acting in furtherance of the right of its employees to have a free choice in the matter of a bargaining agent.

In what better way could the respondent have implemented the rights guaranteed to the employees by the Act than permitting rival organizations equal opportunity

to contact its employees when they were assembled in the plant and to there place before them their relative merits as bargaining agnts for the employees? That the I. A. M. was given full and equal rights and opportunities within the plant is apparent not only from the evidence as to the activities of its membership committee within the plant, but from the reading of the literature which it was permitted to post and keep posted in respondent's plant [see particularly A. F. of L. posters, R. 417-430].

Petitioner cites five decisions to uphold its position (Br. p. 18, note 2). In each of them there was either a denial of equal rights to the outside union, or the use of the company's premises by the so-called company union was accompanied by outright hostility to outside unions on the part of the employer.

In *N. L. R. B. v. Link-Belt Co.,* 311 U. S. 584, the independent union was the successor of an admittedly company-dominated union which was maintained down to the date on which the independent was about to take over. The company had maintained a declared hostility towards outside unions and had practiced industrial espionage. The company discharged two employees for union activity in its plant, while permitting similar activity on the part of employees who were members of the independent.

In *Heinz v. N. L. R. B.,* 311 U. S. 514, there was no evidence that the outside union was either permitted to solicit or prohibited from solicitation within the plant, but the solicitation in the plant on behalf of membership in the

independent union was a part of a concerted effort on the part of the company's superintendent and general foreman to disparage the outside union and prevent the employees joining it through threats of discharge, loss of work or privilege.

In *N. L. R. B. v. Boswell,* 136 F. (2d) 585 (decided by this court) the employer not only was avowedly against the outside union but, far from permitting equal opportunities to that union with the independent union, assisted in running all union members out of the plant and at the same time actively assisted in the formation of the independent union.

In *N. L. R. B. v. Germain Seed & Plant Co.,* 134 F. (2d) 94, instead of the employer being neutral and permitting an outside union equal freedom with the inside union in the solicitation of members, the employer had initiated the formation of the company union, furnished the organizing committee (which later became the alleged bargaining agent of the employees) and, after the formation of the union, permitted every union activity to take place in the company's plant and on its time.

In *Titan Metal Mfg. Co. v. N. L. R. B.,* 106 F. (2d) 254, the activities in respondent's plant consisted of not only the solicitation of members for a company-fostered union, but the holding of all organizational meetings within the plant and on company time, and were a component part of the declarations by the employer against the out-

side union and statements that the employer would have nothing to do with the outside union.

On the contrary, whenever independent union activities on an employer's premises have been coupled with complete neutrality and impartiality on the part of the employer and the granting of like privileges to an outside union, the courts have refused to uphold a Board's finding that the independent's use of company premises constitutes any violation by the employer of the Act.

The principle of this matter is well stated by Judge Parker of the Circuit Court of Appeals for the Fourth Circuit, in *National Labor Relations Board v. Mathieson Alkali Works,* 114 F. (2d) 796, at 801:

> "The fact that respondent made no attempt to curb solicitations for association membership on company property would be a damning circumstance, were it not for the fact that respondent's attitude towards the rival union was precisely the same. * * * So far as we can see from any evidence called to our attention, the attitude of respondent was that of strict neutrality. Membership in the union, as well as membership in the association, was openly solicited on company property during working hours; and certain of the foremen, as well as certain other employees, seem to have been quite active in the union cause."[20]

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[20]See also: *Foote Bros. Gear & Machinery Co. v. N. L. R. B.* (C. C. A. 7), 114 F. (2d) 611, 617-618; *Jefferson Electric Co. v. N. L. R. B.,* 102 F. (2d) 949, 956; *Ballston-Stillwater K. Co. v. N. L. R. B.,* 98 F. (2d) 758, 761-762; *N. L. R. B. v. Sun Shipbuilding & Dry Dock Co.,* 135 F. (2d) 15, 21; *N. L. R. B. v. Sands Mfg. Co.,* 306 U. S. 332, 342, 59 S. Ct. 508.

The Board's Finding, That Respondent Interfered With and Dominated the Association and Interfered With Its Employees in Their Free Choice of a Bargaining Agent Through the Activities of Minor Supervisory Employees Called Leadmen, Is Not Supported by and Is Contrary to the Evidence.

Leadmen, Their Activities, and Respondent's Responsibility Therefor.

Prior to converting its plant to war production, respondent did not employ leadmen. But due to the labor shortage after the factories of this country were turned to the production of war materials, respondent was unable to get sufficient experienced operators in its machine shop. Those who were experienced were therefore given the duty of sharpening the tools for and setting up a group of machines and instructing inexperienced persons in how to push the button or pull the lever that would make the machine operate and turn out the part which it had been set up by the leadmen to machine [R. 56-59; 592-595]. These leadmen had no power to hire or fire, but could make recommendations for discharges in cases of incompetence, drunkenness or disorder. Employees were only discharged after the foreman or superintendent had investigated the facts reported by the leadmen [R. 127-128, 591-592, 598-600]. Their work and the work of those inexperienced hands whom they instructed was supervised by a foreman, and the foreman, in turn, was supervised by the machine shop superintendent. It is admitted that these leadmen were entitled to membership in any union of production employees.

Several employees whom the Board found to be leadmen were members of the Association and participated in its activities. Their activities consisted of solicitation of other employees to join the Association, the collection of dues from members of the Association, and acting in one case as an officer of the Association and in another on an Association committee. In no instance did any leadman attempt to induce membership in the E. M. A. or attendance at its meetings by threats of any kind or by promises of reward, nor in any instance did they disparage the Union or indicate any desire on the part of management that its employees should designate the Association as their bargaining agent, or that the respondent was hostile to the Union.[21]

It is seemingly petitioner's contention that because the so-called leadmen were instructors of and had some slight supervisory duties in connection with the work of other employees, respondent was *ipso facto* charged with responsibility for their acts.

It is undoubtedly true that an employer can be held responsible under the Acts for the deeds and words of minor supervisory employees, and even employees without any supervisory capacity, where the circumstances are such that it may reasonably be inferred that they are acting for and expressing the views of management. Management is not, however, responsible for the acts of minor supervisory employees who are members of an independent union where management has been entirely neutral and

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[21]We will later examine the evidence which is reflected by this paragraph, with proper record references.

impartial and has taken no position favoring the independent union or hostile to the outside union, and the acts of leadmen are not coercive in character and do not pretend to reflect the attitude of management. Our contention is supported by all of the decisions, including those relied on by petitioner.

The case chiefly relied upon by petitioner and which is most often cited as showing that an employer is responsible for the activities of minor supervisory employees is *International Association of Machinists v. National Labor Relations Board,* 311 U. S. 72, 61 S. Ct. 83. In this case the employer had exhibited an "open and avowed hostility to the charging union." It had maintained an admittedly company-dominated union, which it only abandoned in favor of an A. F. of L. union in order to defeat the C. I. O. union. It not only *permitted solicitation for the A. F. of L. on the company premises and company time, and denied this privilege to the C. I. O. union, but discharged five officials of the C. I. O. for union activity.* Four foremen, who had been active in the company-dominated union, switched their allegiance to the A. F. of L. and, with the knowledge of the company superintendent, attempted *to coerce* other employees to affiliate with the A. F. of L. by stating, among other things, that the employer would not deal with the C. I. O. and that those who did not join the A. F. of L. would be discharged, and made offers of increase in rating to induce membership in the A. F. of L. It was under these facts that the Supreme Court held the employer chargeable with these coercive acts of its foremen, which clearly sought to make effective the avowed purpose of the employer to defeat the C. I. O. While this decision holds that it is not necessary that an

employer be responsible under the doctrine of *respondeat superior* before he can be held chargeable with the statements and deeds of minor supervisory employees, it does not hold that an employer is responsible merely because the statements or acts are those of a leadman.

National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 61 S. Ct. 358. In this decision the court had before it, not the acts of minor supervisory employees, such as the leadmen in the case at bar, but the acts of foremen, and in holding that the acts of these foremen might be attributed to management makes doubly clear that they are attributed not because of their supervisory capacity, but because the avowed hostility of the employer to an outside union was reflected by the coercive acts of the leadmen and that the employer thus brought pressure upon its employees in their choice of a bargaining agent. In this regard the court said, in part:

> "Nor does the Board lack the power to give weight to the activities of some of the supervisory employees on behalf of Independent, even though they did not have the power to hire or to fire. As we indicated in International Association of Machinists v. National Labor Relations Board, *supra,* the strict rules of *respondeat superior* are not applicable to such a situation. If the words or deeds of the supervisory employees, *taken in their setting, were reasonably likely to have restrained* the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere. If the employees 'would have just cause to believe that solicitors professedly for a labor organization were acting for and

on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates.' International Association of Machinists v. National Labor Relations Board, *supra.* Here such inferences were wholly justified. *The attitude of the employer towards an 'outside' organization was clearly conveyed. When that was followed by solicitation for Independent on the part of the supervisors who had general authority over the men, it would be unfair to conclude that the employees did not feel an actual pressure from the management."*

61 S. Ct. 366.

Heinz v. National Labor Relations Board, 311 U. S. 514, 61 S. Ct. 320. Petitioner cites this decision of the Supreme Court to uphold its contention. The decision is not, however, upon its facts in point. In the cited case it was not the activities and statements of mere leadmen (members of a union) that were involved, but statements of the employer's superintendent and foremen acting under his direction, all of these acts being coercive in character (311 U. S. 518) and done with the employer's knowledge and without disavowal on its part (311 U. S. 521).

National Labor Relations Board v. Pacific Gas & Electric Co. (C. C. A. 9), 118 F. (2d) 780. By its decision in this case the court makes clear that in order that the acts and deeds of supervisory employees may be charged to management as its acts and deeds, there must be substantial evidence of facts from which it can reasonably be inferred that these employees represented the attitude of the employer and that the acts of these supervisory employees

must be such as to interfere with, restrain or coerce other employees in their choice of a bargaining agent. In the cited case there was substantial evidence that shop foremen, general foremen and the division superintendent (all of whom had greater actual or ostensible authority than the leadmen in the case at bar) had threatened economic action on the part of the employer, including loss of jobs, if the outside union won the election. It is clear that as the statements of the supervisory employees were as to action *that would be taken by management* against the interests of the employees if the C. I. O. won the election; the employees might very reasonably infer that the foremen and superintendent knew whereof they spoke and reflected the attitude of management and were consequently coerced thereby.

The cases we have just discussed are the cases cited and relied upon by the Board. In all of them, except *National Labor Relations Board v. Pacific Gas & Electric Co., supra,* the employers had adopted an attitude hostile to the outside union, so that the employees could reasonably infer that the acts of the minor supervisory employees reflected the attitude of management and were actions taken at its behest. In the *Pacific Gas and Electric Company* case, *supra,* the statements were not made by mere leadmen and were such as to threaten economic action by the employer. In all cases, however, where there is no hostile attitude on the part of the employer which can be reflected by the acts of minor supervisory employees, and where the minor supervisory employees make no threats of action by the employer, or any statements as to its position, it has been uniformly held that it is not reasonable to draw

the inference that they acted for management rather than in their capacity as members of the union of their own choice.

The distinction between the cases relied upon by petitioner and cases such as the one at bar is clearly brought out in *National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co.* (C. C. A. 3), 135 F. (2d) 15, where at pages 20 and 21 it is said:

> "But a 'leader' is sufficiently detached from management so as to be eligible to organize with other employees for collective bargaining purposes, and both the Association and the complaining Union admitted, and still do admit, such employees ('leaders') to membership. *The fact that the duties of the 'leaders' exceeded those of ordinary employees is not of itself sufficient to fix the respondent with responsibility* for the petitions merely because it did not act affirmatively to prohibit and prevent the circulation and signing when its knowledge of their existence could not be directly shown but rested entirely upon imputation. It will be found that, where the condemned activities of minor supervisors (*e. g.* 'leaders') have been charged against the employer, there was present at least some evidence of open or covert opposition or hostility on the part of the employer to employee self-organization or to a particular union or favoritism of another. Cf. International Association of Machinists, Tool and Die Makers Lodge No. 35 v. National Labor Relations Board, 311 U. S. 72, 78, 80, 81, 61 S. Ct. 83, 85 L. Ed. 50. The relevancy of the employer's attitude towards unions was expressly noted in National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 588, 61 S.

Ct. 358, 85 L. Ed. 368. In that case, the employer's attitude to unions was hostile, *but the attitude can be no less relevant where it is favorable to employee freedom in the matter of self-organization.*"[22]

In the case at bar respondent evidenced no hostility towards the Union or preference for the Association, and did not discriminate between the Association and the Union, but permitted each an equal opportunity to present its merits as a collective bargaining agent. There is no evidence that any leadman asserted any hostility of respondent to the Union or made any threats of action by respondent should the Union be named the bargaining agent.

In connection with their claim that respondent is responsible for the acts of leadmen, petitioner, at pages 22-23 of its brief, cites five cases to the point that the fact that leadmen were members of the Association does not prevent their acts from being attributed to management. We concede that the mere fact that the work of a minor supervisory employee is of such a nature as to entitle him to membership in a union of production employees does not, in and of itself, prevent his speaking for management or prevent a reasonable inference being drawn that he speaks for management, where the other facts shown are such as to permit that inference to be drawn. On the other hand, we do contend that where an

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[22]See also: *N. L. R. B. v. Tex-O-Kan Flour Mills Co.* (C. C. A. 5), 122 F. (2d) 433, 438; *E. I. Dupont de Nemours v. N. L. R. B.* (C. C. A. 4), 116 F. (2d) 388, 400; *N. L. R. B. v. Mathieson Alkali Works* (C. C. A. 4), 114 F. (2d) 796, 802-803; *Martel Mills Corp. v. N. L. R. B.* (C. C. A. 4), 114 F. (2d) 624, 633-634; *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 342, 59 S. Ct. 508, 513.

employee who holds a minor supervisory position, without any real authority to speak for management, is also entitled to be and is a member of an independent union, it cannot be inferred that he speaks for management if, under all of the facts, it is equally inferrable that he is acting of his own volition on behalf of the bargaining agent of his choice. In other words, if it is just as reasonable to draw the inference that he acted for his Union and of his own volition as it is to infer that he acted for management, then there is no evidence that he acted for management (*Gunning v. Cooley,* 281 U. S. 90, 94; *Stevens v. The White City,* 285 U. S. 195, 203-204; *Pennsylvania R. R. Co. v. Chamberlain,* 288 U. S. 333; *Cupples Co. Mfg. v. N. L. R. B.,* 106 F. (2d) 100).

If this were not true, the Board could prove that management interfered with and dominated a union by merely proving that minor supervisory employees, members of the union, took part in its affairs.

In *Cupples Co. Manufacturers v. National Labor Relations Board, supra,* the court applied this rule to a case such as the one at bar, stating in part, as follows (p. 114):

> "The evidence that the Company welcomed the organization of an independent union of its employees and preferred such a union to any other, and made haste to recognize the Association as the sole bargaining representative for all of its employees, is not a sufficient factual basis for the finding of interference, domination and support. This for the reason that, while such evidence is consistent with the hypothesis that the formation and administration of the independent union was interferred with, dom-

inated and supported by the Company, it is not inconsistent with the contrary hypothesis, and therefore supports neither."

Activities of Leadmen.

Petitioner in its brief does not purport to demonstrate, but merely infers, that the actions of leadmen in the solicitation of membership in the Association and the collection of dues for the Association were of such a character that employees might conclude therefrom that they reflected the attitude of the company and thus influenced the employees with respect to their union affiliation. In order to demonstrate that the acts and statements of leadmen were not coercive in character or such as to indicate that they were reflecting a desire on the part of management, it is necessary to examine in some detail what actually occurred.

Leadwoman Goebel.

We will first examine the activities of leadwoman Goebel, inasmuch as the Board in its order places special emphasis upon her activities. Goebel was leadwoman on the burr bench during the second shift. It was to this department that most new employees in the machine shop were first assigned, and the only specific instances of solicitation of membership or attendance at the Association meetings by leadmen shown by the record concerned her activities.

The Board called five former employees of respondent as witnesses of Mrs. Goebel's activities. None of these witnesses testified to any threats made by Mrs. Goebel of loss of work or discrimination if an employee joined the

I. A. M. or failed to join the Association. None of them testified as to any inducement being offered to join the Association or not to join the I. A. M. None of them testified to any statement made by Mrs. Goebel, which purported to show a preference of the company for the Association or hostility on the part of the company towards the Union. One of the employees did not join either the E. M. A. or the I. A. M., or attend the meetings of either organization. The other four, prior to any activity on the part of the Union, joined the Association at the solicitation of Mrs. Goebel, but all of them abandoned the Association and either joined the I. A. M. or designated it as their bargaining agent shortly after the Union had offered itself to the employees as a candidate.[23]

The testimony of these five witnesses is briefly summed up as follows:

Anna Cox.

Anna Cox testified that about the 15th of February, 1943, Mrs. Goebel told her, "We have a union of our own. If you want to join, go to the tool crib and pay your dues" [R. 223-224]; that on February 22d she was approached in the plant by a male employee, who wore an A. F. of L. button, and asked to join the A. F. of L.; that she did not join or designate either one [R. 224-225].[24]

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[23]The evidence shows that the I. A. M. activities commenced on January 10th, and were concluded sometime about the first of March, 1943 [R. 307, 309, 429].

[24]Anna Cox, as well as the balance of the five employees above mentioned, were all members of a shift which was laid off on February 22d because, as the Trial Examiner found, of lack of work.

Mary Elsenius.

This witness testified that in November of 1942 [R. 227], she joined the Association as result of a conversation with Mrs. Goebel, in which Mrs. Goebel said that all employees were expected to join, and in reply to a question as to whether or not joining was compulsory was told to "Go to the crib and sign up with Mr. Bucknell" [R. 228].[25] She also testified that she attended but one meeting of the Association and that she attended it because Mrs. Goebel told her that all were expected to go [R. 229];[26] that she ceased to pay dues to the Association after December, 1942, and designated the A. F. of L. as her bargaining agent [R. 228, 230, 232-233].

It is evident that while this witness strove to give the impression that she believed membership in the Association and attendance at its meetings was compulsory, her acts showed that she did not think there was any compulsion whatsoever, for she ceased to attend its meetings, ceased to pay dues to it, and designated the A. F. of L. as her bargaining agent. Certainly this does not show that this employee felt any coercion or compulsion, but on the contrary felt she had entire freedom in the choosing of a bargaining agent.

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[25]Bucknell was employed as tool room attendant, and it has never been contended that he was a leadman or acted in any supervisory capacity.

[26]The evidence shows there was no master switch to turn out the lights over the burr bench, and this was verified through inspection by the Trial Examiner. Other witnesses testified that each employee turned out her own lights [R. 253, 254, 258, 301].

Alice Taylor.

This witness testified she joined the A. F. of L. in November, 1942, shortly after going to work for respondent, as result of a conversation with Mrs. Goebel, in which Mrs. Goebel told her about the Association, asked if she had joined, and then told her, "You can go to the tool crib and join and pay the dues to Buck;" that she only paid dues for November and December [R. 234]; that due to the way in which Mrs. Goebel approached her she thought membership in the E. M. A. was compulsory, but later learned that it was not, and that she could work whether or not she belonged to the Association [R. 241]; that she transferred her membership in the A. F. of L. to the I. A. M. local, which was seeking to organize Gilfillan's employees, on January 11th and then received a union button, but she did not wear it although she had no reason for not wearing it [R. 236]; that she attended but one meeting of the Association, that of January 4, 1943, and that she attended it because Mrs. Goebel told her to go to the meeting [R. 236-237]; that when she first paid her dues she was told that the E. M. A. was an employees' union, "just a union of the employees."

Ella Richardson.

This witness testified that she joined the E. M. A. in November of 1942, during the first week of her employment, as result of a conversation with Mrs. Goebel, wherein Mrs. Goebel asked if the witness had joined the E. M. A., and then said that the witness "should see about it. and to go up to the tool crib and see Buck, that he would take my application and give me my card" [R. 259]; that she did pay dues for December and January; that

she attended meetings of the E. M. A. in December, January and February.

Contrary to the testimony by which Elsenius and Taylor sought to show that employees were led to believe that attendance at the January E. M. A. meeting was compulsory and that the plant was shut down ,this witness testified that they attended the meeting because, when the notice of the meeting was posted, they found they were going to have a discussion about the contract with the company, and they decided to go to the meeting, in order to learn about it and that each individual shut off the power on his or her own machine [R. 252-253]. She further testified that there was a greater attendance at the December meeting of the Association than at either of the others, and that there was about a quarter as many people at the January meeting as at the December, and fewer at the February meeting than the January [R. 254-256].

She testified that she applied for membership in the I. A. M. on February 6, 1943, at which time she received a Union button, which she wore in the shop, and that no one questioned her about the button or her Union affiliation [R. 249-250]; that she did have a conversation with Roy Johnson, President of the E. M. A., in which she asked him if he objected to the Union button she was wearing, and that he replied in the negative; that they argued about the relative merits of the A. F. of L. and the E. M. A., but that she understood he was talking for his organization and as President of it [R. 254-258]; she further testified that the employees who did not attend the Association meetings remained at work in the plant [R. 258].

Myrtice De Shazo.

This witness joined the Association shortly after her employment by respondent on November 24, 1942 [R. 451]. She testified to the following circumstances surrounding her joining: that there was a notice of a meeting of the E. M. A. posted, that she asked Mrs. Goebel what the E. M. A. was, was told that it was a company association for the employees, and suggested that the witness talk to Buck at the tool crib; that she did talk to Buck and paid her dues for one month; that on February 15, 1943, she had a conversation with Marjory Goebel on the subject of the E. M. A. as follows: "She asked me if I was paid up in my E. M. A. dues. I told her I hadn't, and I wasn't going to pay any more. She said I had no reason to object, the only meeting I had been to I won a bond, and that was enough to pay my dues for a year" [R. 455]; that she attended but one meeting of the E. M. A., at which time she had a conversation with Marjory Goebel as follows: "I asked her if we were going to be docked for the time we were over there, and she said she wasn't sure, she didn't know, but supposed that we would be."[27] "I asked her before we started over there if we had to attend, and she said yes" [R. 458]. She further testified, however, that there were only about 150 present at the meeting; and that although she knew there were over 300 operational employees in the plant it didn't strike her as strange that all not in attendance were disobeying orders [R. 462-463]. She further testified that she didn't even think as to whether or not it

[27]The evidence shows without conflict that all employees were docked for time spent at Association meetings.

was an Association rule or a Company rule that compelled attendance at the Association meeting [R. 463-465].

Mrs. Goebel denied that she had ever told any of the women that they had to attend Association meetings or said anything more than it was time to go to the meeting [R. 301]. She also denied that she turned out the lights over the benches, and further testified that the lights were left on and those who did not attend the meeting continued with their work [R. 302-303].[28] She further testified that she never checked up to see if those whom she asked to join the E. M. A. had or had not joined [R. 303]; that she did not hold any office in the E. M. A., but that she did talk to the girls about membership in the Association, and it would be just after they had been employed for a while that she "just told them if they wanted to join the E. M. A. * * * to go around and talk to Buck * * * and he would explain it to them" [R. 292]; that she never requested any of the girls to go with her to the meetings of the E. M. A. [R. 293].

Giving full credit to the testimony of the five witnesses called as to the activities of Mrs. Goebel, there is nothing in their evidence to establish any fact from which it could reasonably be inferred that respondent was attempting through her to influence or coerce its employees, or from which it could be inferred that employees believed that she was expressing the views and desires of management,

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[28]We direct the court's attention to the fact that none of the witnesses who testified as to the activities of Mrs. Goebel, with the exception of Miss Richardson, ever attended more than one meeting of the Association, and none of them testified that the lights were turned off or the power shut off during the meetings which they did not attend.

rather than acting for and on behalf of the union of her choice. While certain of the witnesses attempted to show that they felt that membership in the E. M. A. and attendance at its meetings was compulsory, the facts to which they testified belie their statements. All of those who sought to give this impression abandoned the E. M. A. shortly after joining it, ceased to pay dues to it, or attend its meetings, and openly espoused the cause of the I. A. M. Certainly this evidence not only fails to show compulsion or coercion or influence, but on the contrary, shows that these employees openly and freely exercised their right to choose their bargaining agent and made their choice contrary to what would have been the wishes of management if those wishes had been expressed by the solicitation of Mrs. Goebel.

Certainly, in view of respondent's complete neutrality and the open solicitation of members in the plant by the Union, it is equally consistent to infer that Mrs. Goebel's actions expressed merely her own ideas and her support of the union of her choice as to infer that she acted for and expressed the views of management.

To hold that an employee having some slight supervisory duties, such as those of Mrs. Goebel, could not solicit and work for the union of her choice, would be to deny to such employees the rights of the statute (National Labor Relations Act) which was enacted for their benefit (*N. L. R. B. v. Tex-O-Kan Flour Mills Co.* (C. C. A. 5), 122 F. (2d) 433, 438).

LORETA SCHWERTFEGER.

The Trial Examiner found that Loreta Schwertfeger acted in the capacity of a leadwoman. The record, however, establishes that her duties were those of an instructor in the Inspection Department, who also did inspection work along with other employees in that department. She testified that she had never been told she was a leadwoman, had never been paid as such, and had never told anyone else that she was one [R. 479]. She was not classified upon respondent's records as a leadwoman [R. 39].

Miss Schwertfeger and other inspectors worked in a relatively small room under the direct supervision of a foreman [R. 484]. She testified that she collected some dues for the Association in January, 1943; that some of the girls in the department asked her what the E. M. A. was, and she told them it was a union, that they would have to talk to the President of the union to find out what it was about [R. 479]; but none of them asked her what kind of union it was; that she went to some E. M. A. meetings; most of the other girls on her shift were members of the E. M. A. and went along; that none of them ever asked if they had to go to the meetings [R. 480]; that some of her collecting of dues was done during working hours and some during rest periods.

There was no evidence of any act on her part other than the mere solicitation of membership and collection of dues. Certainly there is nothing in this testimony from which it can be inferred that Miss Schwertfeger acted in anywise than as a member of the union of her own choice or from which it can be inferred that through

her respondent, in spite of its neutral and impartial attitude, was covertly seeking to influence its employees in their choice of a bargaining agent or to interfere with them in the exercise of the rights granted by Section 7 of the Act, nor is there anything to show that any employee looked upon, or had reason to look upon, Miss Schwertfeger as acting for respondent in soliciting membership in the Association. She made no statements that pretended to reflect the attitude of respondent or that were in anywise coercive in character, and did nothing that any employee, a member of the Association, might not do in furtherance of its interests.

Roy Johnson.

Roy Johnson was elected President of the Association in the spring of 1942, and remained President of that Association during the period of the Union's activities at respondent's plant. The Trial Examiner found him to be a leadman. The evidence as to the capacity in which he served respondent during the time he was President is clear and uncontradicted. The evidence shows that prior to July, 1942, Johnson had been an operator on the milling machines; that in that month respondent was unable to procure a competent leadman on those machines and Johnson, who was then President of the Association. was advanced to leadman with the undersanding that the position was temporary and that he would revert back to an operator when a competent leadman could be found; that after Johnson was made a temporary leadman and prior to the last of January, 1943, two different men were employed as leadmen on the mills and Johnson put back to work as an operator; finally a competent leadman was

found the last of January (this was at the height of the I. A. M. organizational drive) and Johnson for the third time in the period became an ordinary operator. Johnson did not draw pay as a leadman and was not classified as such [R. 532, 539, 544, 545, 569].

We submit that there is nothing in these facts from which any employee could have inferred that a man who was put up and down in his department without any change in his rate of pay was the favorite of management or authorized by management to speak for it. Nor is there anything in these facts from which it could be inferred that management was seeking to show its preference for the Association as a bargaining agent, through making its President a temporary leadman (without a leadman's pay), and this is particularly true in view of the fact that he was finally demoted from his temporary position at the very height of the organizational drive conducted by the I. A. M.

If respondent had insisted that the Association remove Johnson as its President in order that it might proceed with its production of war materials through using his services temporarily as a leadman, a charge that respondent had interfered with the Association would have been well founded.

LEADMAN CLARK.

The only activity on the part of this leadman shown by the record is the testimony of the witness Hines, that after a meeting of the E. M. A. had been announced by a bulletin, leadman Clark said, "The meeting is being held over at the hall" [R. 210-212].

SUPERINTENDENT CRAMER.

Cramer was Superintendent of respondent's machine shop and had the power to hire and fire employees. George Nelson, a former employee of respondent, testified that on the day of the E. M. A. meeting in January, 1943, he asked Cramer if it was necessary to knock off work to go to the meeting, and that Cramer replied, "Personally, as an official of the company, I can't say anything * * * They should all attend to it"; he said they could go over there in a body and they might get a raise out of it and keep some other union from coming in on them [R. 145].

Cramer denied that he had ever said the employees should go over in a body or that they might get a raise out of going, but admitted that he had said that while he couldn't say anything as an official of the company, he thought that they should go over to the meeting, and that on various occasions, in response to questions from employees as to whether they should go to meetings, he had advised them that in his capacity as Shop Superintendent he could not give them any advice, but that personally he thought "if they expected to get any benefit from any association, they should forfeit something to it", and that therefore he thought they should go, but that he told them that they did not have to go [R. 590-591; 596-597].

In considering the testimony of Nelson and Cramer, it must be remembered that the meetings which were under discussion were meetings for the members of the Association, not meetings which the employees generally

were entitled to attend, and that the uncontradicted evidence shows that at the meeting as to which the testimony of Nelson refers there was a very poor attendance [R. 254]. In view of these facts we think that Cramer's version of the incident must be accepted, for if Nelson's statement is true, that Cramer had in effect ordered the employees to go to the meeting, it would certainly be strange that less employees attended it than attended the prior meetings when no orders were given. Whether or not Cramer's version or Nelson's version can be accepted, it is clear that no employee could have understood that Mr. Cramer was attempting to speak for respondent or to reflect its views or attitude, because under the testimony of both witnesses Cramer made it clear that he was only expressing his individual opinion as to whether members of the Association should attend the meetings. Cramer's statement, even if we accept Nelson's version of it, was not coercive. It could not have been addressed to persons who had not already made their choice of a bargaining agent, for the meeting which was to be held was not a meeting for the employees generally, but was a meeting of members of the Association who had already made their choice of a bargaining agent.

We do not understand that there is anything in the Act which deprives a Superintendent of a plant from expressing an individual opinion as to whether or not employees should attend the meeting of an Association of which they were members, so long as their statements are

not coercive in character. To deny them this right would be to deny their constitutional right of free speech.

N. L. R. B. v. Virginia Electric & Power Co., 314 U. S. 469, 62 S. Ct. 344;

N. L. R. B. v. Union Pacific Stages (C. C. A. 9), 99 F. (2d) 153, 178;

Jefferson Electric Co. v. N. L. R. B. (C. C. A. 7), 102 F. (2d) 949, 956;

N. L. R. B. v. Hollywood Maxwell Co. (C. C. A. 9), 126 F. (2d) 815, 823;

Midland Steel Products v. N. L. R. B. (C. C. A. 6), 113 F. (2d) 800, 804;

N. L. R. B. v. Citizen-News Co. (C. C. A. 9), 134 F. (2d) 962, 963-965;

N. L. R. B. v. Sunshine Mining Co. (C. C. A. 9), 110 F. (2d) 780, 786 .

Other Activities of Leadmen.

Petitioner points to certain other activities of leadmen as evidence of respondent's interference with or domination of the Association.

Petitioner points out that leadman Clark was elected to the Association's grievance committee and accepted the nomination in January of 1943. It neglects, however, to mention that Clark did not act on the committee [R. 395].[29]

Petitioner asserts that leadman Bleuel served on the committee which negotiated and signed the Association's

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[29]It was the grievance committee that acted for the union in the negotiation of the 1943 contract, and Clark is not one of the persons who executed that instrument for the Association [R. 440].

1943 contract. This is a misconception of the evidence. Leadman Bleuel was a member of the committee, but there is no evidence in the record that Bleuel was a leadman at the time he acted as a member of the negotiating committee. The contract was signed at some date between the 5th and 10th of May, 1943, and Bleuel was then an operator upon a turret lathe.

Petitioner relies on the testimony of Albert Walters [R. 115] to show that Bleuel was a leadman at the time of the execution of the contract. The record does not support this. Walters was testifying as of the time of the trial.

Leadman Scheid served as a committee of one to arrange on behalf of the Association for the installation of new vending machines in the plant after the vending machines which had theretofore been in the plant had been destroyed by the fire in 1940. These activities on Scheid's part took place in June or July of 1941 [R. 602]. He was selected by the Association to negotiate with the owners of vending machines, to place machines for dispensing soft drinks, candies and cigarettes in the plant, and to pay the Association a commission on the sales made through the machines. There is no evidence that respondent had any part in his selection, or that it knew of his selection until after his negotiations with the vendors were completed, when he made arrangements for commissions to be paid to the Association through the respondent [R. 604]. The evidence further shows that Scheid was made a foreman on the swing shift in February of 1943, and that after his appointment as foreman he ceased to be a member of the Association [R. 606].

Petitioner argues that because respondent, at the request of the Labor Board, in May of 1941, posted a letter which stated that it would instruct its foreman and leadman not to accept places on committees of labor organizations having members in the employ of Gilfillan Bros., Inc., it had held out its leadmen as the representatives of management, and that therefore any activity on their part must be attributable to management.

This reasoning seems to us to be far-fetched and fallacious. There is no dispute but that respondent did, by and through its letter, instruct its leadmen not to accept places on committees of labor organizations. But it is also undisputed that the leadmen were members of the E. M. A., and as such entitled to hold office therein. If the employees who were members of the Association were to have the unfettered discretion in bargaining with management which is granted to them by Section 7 of the Act, then they had the right, irrespective of any directions of management or of the Board, to pick such of their members as officers or committeemen either in dealing with management or in conducting the internal affairs of the Association as they saw fit.

There is no evidence that respondent took any part in or suggested the election of Clark to the grievance committee—the evidence is that he did not act as a member of that committee—or of Scheid as a one-man committee to negotiate on behalf of the Association with third persons who were owners of vending machines, or with the selection of Johnson as President of the Association. The evidence does show that the letter [Respondent's Ex. 10, R. 366] instructing leadmen not to take office in or act on

committees of the Association was posted, and for a long period remained posted, on respondent's bulletin board, so that it must be inferred that its contents were known to the employees generally.

The only remedial action that respondent could have taken when the Association, of its own volition and despite the terms of the letter of 1941, appointed leadmen to speak and act for it, would have been to force the union to elect other officers or committeemen or to demote the leadmen appointed. By such action respondent would have directly interfered with the administration of the Association and dominated it in the consummation of the very purpose for which it was formed, that of bargaining with respondent.

The acts of the employees in selecting in open meeting leadmen to act for them on committees or as officers demonstrates not that the Association was sponsored or controlled or interfered with by management, but that the employees were asserting their right to choose whom they pleased from among their members to speak and act for them, despite the expressed will of management to the contrary.

Leadmen, as members of the Association, had the right to participate in its affairs, and respondent could no more destroy that right than it could, through the actions of leadmen, destroy the rights of its employees to be free in their selection of a bargaining agent. If respondent could dictate to the Association so as to prevent a leadman from acting as one of its officers or taking part in the internal affairs of the Association (such as entering into business contracts with persons other than respondent), it

could to a large extent control and dominate the Association. The respondent could thus rid itself of the necessity of dealing with an employee who was objectionable to it because too insistent upon the rights of the Association and its members, by in effect bribing such employee to abandon his uncompensated office in the union through offering him promotion to the position of leadman at an increase in pay. (The evidence shows that leadmen were paid from 10¢ to 15¢ an hour more than other operators.)

If respondent had sought to take the remedial action which the Board says it should have taken, it would have violated the Act and deprived its employees of the rights granted them by the Act.

> *N. L. R. B. v. Hollywood Maxwell Co.* (C. C. A. 9), 126 F. (2d) 815, 823-824;
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> *Magnolia Petroleum Co. v. N. L. R. B.* (C. C. A. 5), 112 F. (2d) 545, 552;
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> *N. L. R. B. v. Arma Corporation* (C. C. A. 2), 122 F. (2d) 153, 156;
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> *N. L. R. B. v. Tex-O-Kan Flour Mills* (C. C. A. 5), 122 F. (2d) 433.

In *N. L. R. B. v. Arma Corporation, supra,* the Board, because of the activities of leadmen, had found that an independent union was company-dominated. In holding that the activities of the leadmen, members of a union, were not substantial evidence to uphold the finding of the Board, Judge Hand of the Second Circuit said, in part:

> "If such employees were not to be free to express their opinions and to urge fellow-workmen to organize in a certain way, the interest and activity of

the most competent men in the appropriate bargaining group would be eliminated. * * * There was no evidence that the officers or supervisory employees consented that key men should represent the views of the corporation, or gave the other workmen reason to suppose that the key men worked for Independent in order to please Arma. *If the latter had interfered with the labor activities of the key men, except to prevent canvassing during working hours, it surely would have been guilty of an unfair labor practice and would have deprived these men of rights guaranteed under Section 7 of the National Labor Relations Act.*"

NEGOTIATION OF THE 1943 CONTRACT.

Petitioner asserts that the fact that respondent *in May of 1943* negotiated a contract with the certified bargaining agent of its employees, the Association, and the circumstances surrounding the negotiation of that contract, constitute proof that the Association was dominated or controlled by respondent.

Let us examine the facts. In 1937, after an election held under the auspices of the Board, the Association was certified as the collective bargaining agent for respondent's employees. It thereafter each year entered into contracts with the Association. There is no evidence that these contracts were not negotiated at arm's length. Between 1937 and 1943, no other labor organization had attempted to organize respondent's employees or had asserted that it represented a majority thereof. In April, 1942, respondent entered into a contract with the Association which by its terms expired on the 30th of April,

1943 [R. 582-585]. By the terms of Section 4 of this contract it was provided that "because of changing economic conditions it was understood that negotiations for changes in wages may be reopened by either party at any time." Prior to March, 1943, the parties had commenced negotiations for the revamping of the wage scale of the employees and changes in other terms of the contract [R. 565-566].

On February 27, 1943, the Union filed a petition under Section 9 of the Act [R. 216-217]. Respondent and Association were notified by letter on that date of the filing of this petition [R. 617], and a copy was sent to each. On about March 6th, a committee, including the officers of the Association, waited upon respondent's President, Mr. S. W. Gilfillan, who had been absent from the state, relative to negotiations for a contract for the coming year [R. 317-319, 566, 581] between the Association and the Company. At this meeting the notice which had been received from the Board relative to the petition of the I. A. M. to be certified as the bargaining agent of Gilfillan's employees was discussed, and Mr. Gilfillan stated that *if there was going to be an election* he didn't want to enter into any contract until he knew whether or not the Association or the A. F. of L. represented the employees, and that he wasn't going to deal with either, until he knew who had won the election [R. 526]. Johnson then told Gilfillan he would let him know in a few days how many members the Association had, as the National Labor Relations Board had requested a list of the members of the E. M. A. Sometime later Johnson did advise Gilfillan of the number of members claimed by the E. M. A.

On March 8th, a few days after the meeting between the Committee and Mr. Gilfillan, the Union dismissed its petition under Section 9 of the Act and filed charges of unfair labor practices [R. 1, 217]. An amended charge was filed on May 5th, and on May 22nd the complaint was issued and served upon the respondent.

When the meeting between the Association's committee and respondent's President was held early in March, the I. A. M. was claiming that it represented a majority of respondent's employees.[30]

When, however, the petition for determination of representation was dismissed, the situation was entirely changed. The Board had certified the E. M. A. as the bargaining agent for respondent's employees. This agent respondent was bound to recognize until some other was certified, or proof had been made to respondent that some labor organization other than the E. M. A. represented a majority of its employees. Until one of these things occurred respondent was entitled to assume that a majority of its employees, even though they were members of neither labor organization, desired no change in their bargaining agent (*Valley Mold & Iron Corp. v. N. L. R. B.* (C. C. A. 7), 116 F. (2d) 760, 764-765). The I. A. M. had withdrawn its petition which would have enabled the Board to determine whether or not the respondent's employees desired the I. A. M. or the E. M. A. as its bar-

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[30]It is apparent that this claim was not made in good faith, for as of that date it had authorization cards or membership applications from but 131 of respondent's employees [Respondent's Ex. 27, R. 622], and had demanded that certification proceedings be instituted by the Board. Therefore, Gilfillan's statement, if there was going to be an election he would not enter into a contract until he knew which union had won the election, was not only common sense, but a statement of what the Act required.

gaining agent, and had not offered to respondent any proof that it represented a majority of the respondent's employees.[31] Respondent was, therefore, in the position of either continuing to deal with the E. M. A., the certified bargaining agent, or refusing to deal with it, thus subjecting itself to the charge of unfair labor practices in the event that the charges of unfair labor practices made by the Union were either not prosecuted or were found to be unwarranted.

An employer certainly is not bound to refuse to continue to deal with a certified bargaining agent every time some other labor organization makes an unsupported claim to represent a majority of its employees, nor does he continue to deal at the risk of having his act offered as evidence of interference with and domination over the certified union with which he deals. (*Cf.: N. L. R. B. v. Hollywood Maxwell Co.* (C. C. A. 9), 126 F. (2d) 815, 823; *N. L. R. B. v. Sun Shipbuilding & Drydock Co.* (C. C. A. 3, 135 F. (2d) 15, 19.) Yet that is the position of the Board in this case.[32]

The E. M. A. having once been certified by the Board as the bargaining agent for respondent's employees, the question as to whether or not a majority of its employees remained *members* of the E. M. A. was of no moment. The only question which could affect respondent's duty to deal

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[31]The reason for this is evident, as it then represented but 131 out of more than 500 employees [R. 622].

[32]This matter has been pending for eighteen months. If the Board's position is correct, then the employees would have been without a bargaining agent and respondent could have entered into no collective contract with its employees during this entire period.

with that Association was, had a majority of its employees chosen a different bargaining agent. The Act required the respondent to deal with the certified bargaining agent of its employees. This was a continuing duty, from which respondent could only be relieved by proof that the majority of its employees had chosen another bargaining agent or by the certification of a new bargaining agent.

Petitioner claims that respondent entered into the contract of 1943 (it should be remembered that this contract was not entered into until May, while the conference with the employees at which Mr. Gilfillan made the statements upon which the Board relies was held early in March) without any evidence that a majority of its employees were members of the Association. This claim is not borne out by the record.

Johnson testified that he told Mr. Gilfillan at the meeting in March that the Board had requested the names of members of the E. M. A. and that this was being prepared, and that in a few days he would let Mr. Gilfillan know how many members the E. M. A. had [R. 567]. The record further shows that Johnson did submit a list of the E. M. A. members to the Board's investigator, Mr. Ogran, which showed that the E. M. A. had 294 members. We believe that it must be inferred that this is the number of which he advised Mr. Gilfillan.[33]

The Board in its brief lays particular emphasis on the fact that respondent negotiated a contract with the Association for the year 1943 as proof to uphold its finding

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[33]294 was more than a majority of respondent's employees [R. 167, Pet. Br. p. 14].

that the E. M. A. was a Company-dominated union. ~~This fact, however, cannot support the finding, for if the E. M. A. was a legal union,[34] then respondent was bound to deal with it until some other organization in fact represented a majority of its employees.~~ This fact, however, does not render support to the Board's finding, for if the E. M. A. was a legal union, then respondent was bound to deal with it until some other organization in fact represented a majority of its employees. If the E. M. A. was an illegal union, then that fact might affect the enforcibility of respondent's contract with it, but the contract would not render an otherwise legal union illegal. The evidence showing without conflict that the Union did not represent a majority of respondent's employees, and there being no proof that a majority of the employees no longer desired the E. M. A. as their bargaining agent, how can proof that respondent contracted with it be proof that respondent dominated it and that it is, therefore, an illegal union?

Other Alleged Acts of Respondent.

In a statement prepared by an investigator for the Board and signed by one of respondent's employees, Oswald Lundberg, Lundberg stated that during the period that Thorstenson was Chairman of the E. M. A. (this date is not fixed, except that the context of the statement shows it to be prior to the fire in 1940) the E. M. A. was comparatively inactive, that its activities revived in March, 1941, when "either the C. I. O. or the A. F. of L. were distributing pamphlets in the plant at the time" [R. 371].

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[34]By "legal union" we mean one not subject to disestablishment because of unfair labor practices on the part of respondent.

The witness, Morton Pfleger, testified that there was not a great deal of activity on the part of the E. M. A. in 1937 [R. 275]. From this evidence petitioner infers that the E. M. A. only became active when other unions were active, and upon this inference bases the further inference that this activity of the E. M. A. was inspired by respondent.

Irrespective of the fact that a fact cannot be proved by basing an inference upon an inference, we do not believe that the second inference can be drawn from the evidence. The evidence shows no act on the part of respondent or any of its officers, superintendents or foremen inciting any activities on the part of the E. M. A., or any act or deed against outside unions. The evidence shows that each year the E. M. A. negotiated a new contract with respondent [R. 8, 14]; that it held monthly meetings; that it made demands for and negotiated new wage scales and increases in wage rates [R. 409-411, 413, 430-431, 432-442, 445, 446, 447, 565, 568, 582-586]; that in 1942, when there was no outside union activity at the plant, its members were attempting to influence other employees to join their organization. In fact, the activity of members of the E. M. A. in 1942 is one of the facts upon which the Board relies to substantiate its findings.

The evidence shows that there was at no time any labor disputes between respondent and its employees, and fails to show that the employees were in anywise dissatisfied with their working conditions, pay, or with the contracts between their bargaining agent and respondent. It is, therefore, not strange that membership in the Association, which was the bargaining agent, fell off during the periods

when that Association had no competition or opposition and the employees were making no demands on respondent. Nor is it strange that the members of the E. M. A. should be more zealous in protecting the status of that Association, as bargaining agent, when the interest of the employees in the choice of a bargaining agent was stimulated by the activities of a competing union. The situation is comparable to a school football team. There are never many candidates for one that has no games scheduled and must scrimmage against itself.

The respondent, having shown no hostility towards either union or any choice between the unions, how can the activities of one against the competition of the other be said to have been incited by management?

Petitioner further claims that the "comparative inactivity" of the E. M. A. during certain periods shows that it was not "a truly independent labor organization whose purpose is to represent the employees for the betterment of their wages and working conditions" (Br. p. 12).

Conceding for the purposes of argument that the evidence shows "comparative inactivity" on the part of the Association in the periods mentioned, there is no evidence to show that this was because of any interference on the part of respondent or that it was due to anything else than that the employees were satisfied with the E. M. A. as their bargaining agent, and that there were no matters in the relationship between respondent and the employees with which the employees were dissatisfied.

But in any event the efficacy of the Association as a bargaining agent is no affair of the Board. The Act does

not require employees to adopt a militant attitude in the exercise of their guaranteed rights, nor has the Board the right to determine whether the employees have been reckless in their choice of a bargaining agent or test the "practical effectiveness of that bargaining agent." (*E. I. Dupont de Nemours v. N. L. R. B.* (C. C. A. 4), 116 F. (2d) 388, 399; *N. L. R. B. v. Mathieson Alkali Works* (C. C. A. 4), 114 F. (2d) 796, 802; *Humble Oil & Refining Co. v. N. L. R. B.* (C. C. A. 5), 113 F. (2d) 85, 88.)

In support of its point that the alleged inactivity of the Association constituted proof of company domination, petitioner (Br. p. 18, note 26) cites three cases. We have examined these cases with care, but in only one of them[35] is there any mention of the point, and then only by way of reference to the grounds upon which the Board, not the court, based its decision.

Wage Increases.

Petitioner asserts that the wage increase given by respondent to its female employees, effective as of January 10, 1941, is substantial evidence that respondent was thereby seeking to weaken the attempts of the I. A. M. (whose activities at respondent's plant started on the 10th or 11th of January) to organize its employees. Petitioner but casually mentions the facts that the negotiation for this raise in wages had been started by the E. M. A. before there was any activity by the I. A. M., that the raise was not announced throughout the plant but was only brought to the attention of the persons receiving the increase by the increased amount of their next pay check

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[35] *Continental Box Co. v. N. L. R. B.*, 113 F. (2d) 93.

[R. 554-555, 557][36] and that in December, 1942, an increase was also requested for the men in the hydraulic department [R. 576], but that this was not granted until about May, 1943 [R. 430]. Petitioner also overlooks the fact that at the time the raise for women employees was requested, a raise was also requested for other employees in the machine shop which was not granted [R. 430, 448].

This court will take judicial notice of the fact that in October of 1942 the War Labor Board, pursuant to the authority vested in it by the President, had made it unlawful for employers to pay wages beyond those fixed by wage scales in effect as of October 3, 1942. On November 24, 1942, the War Labor Board issued its General Order No. 16.[37] The effect of this order was to permit employers to equalize the wage or salary rates paid to women with rates paid to males for comparable quality and quantity of work. The evidence here shows without conflict that this order was first brought to respondent's attention by Roy Johnson in December, and in the latter part of December ,or early part of January, and after the matter had been investigated by Mr. Sparks (respondent's vice-president) and it was found that the order was effective, respondent did give a raise to its women employees, but only in so far as it was necessary to adjust their wages with those of men [R. 564, 558]. From this evidence it cannot be inferred that respondent was seeking to influence its employees. The raise was one indicated by the War Labor Board's order, it had been requested by the E. M. A. late in December before the I. A. M. activities

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[36]This was true in all cases of raises given employees [R. 557].

[37]C. C. H. Labor Law Service, Vol. 1A, par. 11.516.

had started, and was granted within a reasonable time after requested. No publicity was then given to the raise, nor was any announcement made that the Company had joined with the E. M. A. in seeking an increase for the men in its hydraulic department.

Certainly if respondent had been seeking to influence its employees in their choice of a bargaining agent, it would not only have given publicity to the fact that it had raised its women, but would have publicized the fact that it had asked the War Labor Board for permission to increase the wages of the men in its hydraulic department, and instead of taking no action on the request for increases for men in the machine shop, would have filed an application with the War Labor Board for such an increase. Such action on its part would not have cost respondent a dime and would have appealed to the employees generally, not to the few women who received the benefit of the raise which was given. Evidence such as this does not amount to substantial evidence and could not raise even a suspicion that the respondent was attempting to influence its employees in the mind of anyone, except a Board acting in the cause not only as judge but as a party litigant and prosecutor.

If the Board's position is sustained, then no employer, no matter how impartial and neutral, may grant a raise in wages to a group of its employees while a union is seeking to have itself chosen as bargaining agent by the employees in place of another union, without being subject to a charge of unfair labor practices.

HOUR OF E. M. A. MEETINGS.

As further proof that respondent favored and interfered with the Association, petitioner points to the fact that the monthly meetings of the E. M. A. were held between 5:30 and 6:30 o'clock, and asserts that the plant was closed for work during this period.

We have heretofore pointed out that the respondent's plant was operating twenty-four hours of the day. If the Association was to have meetings which its members could attend, and the Association thus function, its meetings would have to be held during working hours. The day shift went off duty and the night shift came on duty at 6:00 P. M. The hours chosen by the E. M. A. for its meetings were therefore those which would least interfere with the productive efforts of its members.

The evidence does now show (as claimed by petitioner) that respondent closed its plant or shut down either the day or night shift during the period of the E. M. A. meetings. On the contrary, it shows that members of the Association were allowed, on their own time (it is admitted that they were docked for any time spent at the Association meetings), to attend the meetings of their union. But the evidence clearly shows that during the period of the meetings, those who did not desire to attend continued at their work [R. 258, 590-591].[38]

If respondent had refused to permit members of the Association to attend union meetings on their own time,

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[38]The meetings were not organizational ones, open to all employees (such as were held by the I. A. M. in January and February [R. 423-424, 429-430]), but business meetings for E. M. A. members only.

certainly it would have obstructed their free exercise of their right to maintain a union of their own choice. They had a right to meet as a body, to elect officers and committees, and to discuss the demands that were to be made through these officers and committeemen upon management. They had the right to have a voice in and to express their individual opinions upon their union's business; this they could do only through meetings. It may be true that affiliated unions in many cases make demands upon management, which demands are conceived and carried out solely by the paid officers of the union and without consultation with the members of the union. But that is not the spirit of Section 7 of the Act.

Throughout its brief petitioner asserts that respondent was attempting to influence its employees to attend meetings of the E. M. A. There is no evidence that these meetings were open to anyone other than the persons who were members of the Association. It would be a strange way for an employer to influence its employees in their choice of a bargaining agent to insist that they attend the meetings of one association and then dock them in their pay for so doing.

FINANCIAL SUPPORT.

There is no conflict in the evidence as to the facts upon which the Trial Examiner bases his finding of the ultimate fact, that the respondent "contributed support" to the Association [R. 43]. The evidence on this point falls into three separate parts: first, the contribution to an employees' picnic; second, vending machine revenues prior to 1941; and third, vending machine revenues after 1941.

Contribution to Employees' Picnic.

The evidence shows that in 1937, the year in which the Association was formed and was engaged in a contest with the C. I. O. for members, the Company gave a picnic for all of its employees and their families. The Association played no part in either sponsoring, financing or managing the picnic [R. 179].

In 1938 another picnic was held, to which all employees, irrespective of union affiliation, and their families were invited. This picnic was sponsored by the E. M. A., but it found that it was short of funds to pay the entire cost of the picnic, and the deficit was made up either by the Company or its President, Mr. S. W. Gilfillan [R. 182]. One of the officials of the Company induced firms from whom respondent purchased supplies to donate prizes at both picnics [R. 180, 181, 184, 185, 186].

Vending Machine Revenue Prior to 1940.

At the time of and prior to the formation of the E. M. A., owners of machines vending candy, cigarettes and soft drinks had maintained in respondent's plant certain machines vending their merchandise. For that privilege they paid a percentage of the sales made through the machines. This percentage respondent did not accept for its own benefit, but gave to a charity. *After* the formation of the Association and its selection as bargaining agent, the E. M. A. asked that it receive the commissions on the sales made through the vending machines, and this right was granted them [R. 182-183]. Respondent's records of the amount of these commissions were destroyed in the fire of 1940, but Semple testified that the E. M. A. received about $12.00 per month [R. 188].

VENDING MACHINE REVENUE AFTER 1941.

The vending machines which were in the plant prior to November 30, 1940, were on that day destroyed by fire. When the plant was rebuilt, respondent did not have the machines replaced.

In the spring of 1941, the Association appointed one of its members to negotiate with vendors of soft drinks, cigarettes and candy to place machines in the plant and to pay the Association a commission. The member appointed made direct contact with the vendors and made arrangements as to payment of a commission to the Association [R. 602-603, 588]. After the arrangements were made and the machines installed, difficulties arose in the collection of the commissions by the Association, and the Association's committeeman directed the vendors to send the checks to the Company [R. 603-604, 589] and *then* contacted one of the Company's officials and asked him if he had any objection to the money being sent to the Company [R. 604]. The evidence shows that the respondent had nothing to do with the servicing of the machines or any ironing out of troubles when they were not functioning, but that this was taken care of by the Association [R. 604-605]. Thereafter respondent received the commissions from the vendors and entered each amount remitted in an account payable to the Association, and from time to time on demand of the Association paid the amount accumulated to the Association [R. 262-265]. From the date of the installation of the machines to the time of trial the amount of the commissions averaged less than $15.00 per month.

The E. M. A. also maintained a milk vending box in the plant, but this was operated by it at a loss [R. 415]. The record does not show the aggregate loss sustained by the Association through the sale of milk, but does show that in December, 1942, there was a loss of $7.00, and in January, 1943, a loss of $8.60 [R. 396-397, 414]. None of the machines was marked so as to show that they were operated by the E. M. A., nor is there any evidence that the fact that the Association received the revenue from them was known to the employees other than the officers of the Association.

The payment by the respondent or its President of the deficit arising out of the picnic which was given for all employees in 1938 (nearly five years prior to the filing of the charges herein) if a contribution to the E. M. A., certainly in the absence of further like contributions, could not be held to so have infected the E. M. A. as to leave it permanently crippled and necessitate an order of dis-establishment.

We submit, however, that this contribution was not a contribution to the E. M. A. The picnic was given for the benefit of all of the employees without distinction as to union membership, and each of them received equal benefit from the payment made by respondent. At the time of the 1938 picnic the E. M. A. had just been chosen by the majority of the employees as their bargaining agent and no other union was seeking to so represent them. The payment was therefore evidently not made in any attempt by respondent to show favoritism to one organization over another, or to interfere with the administration of the E. M. A., or to curry favor for it among the employees,

but on the contrary it was merely a friendly act, not towards the E. M. A., but towards all of the employees.[39]

There is no doubt that from a technical standpoint the contributions by respondent of the commissions which it received from the vending machines prior to the fire, and which amounted to approximately $12.00 per month, constituted a financial contribution to the E .M. A. by respondent. That this contribution had no connection with the formation of the E. M. A. is apparent from the record, for as we have shown the contributions were not requested and did not commence until after the formation of that Association and its selection as the bargaining agent of the employees. If these contributions ever interfered with freedom of action on the part of the E. M. A. or in the choice by the employees of that association as their bargaining agent, that effect ceased to exist when the contributions ceased, nearly three years prior to the filing of the charges out of which this case arises.

That these contributions are not such as were contemplated by Congress in using the words "financial support" in the Act is evidenced by the *Senate Committee Report No. 573* of May 2, 1935, Seventy-fourth Congress, First Session, where the Committee said:

> "It seems clear that an organization or a representative or agent *paid by the employer for representing employees* cannot command, even if deserving it, the full confidence of such employees. And free labor relations depend upon absolute confidence on the part of each side and of those who represent it."

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[39] *Cf. N. L. R. B. v. Algoma Plywood Co.*, 121 F. (2d) 602.

The E. M. A. had no paid officers or employees. Respondent had no part in its formation, and the evidence fails to show that it was anything other than an organization spontaneously formed by the employees to act as their bargaining agent. The evidence fails to show that respondent at the time of these contributions or at any time in anywise participated in the internal management or administration of the affairs of the E. M. A. or expressed any wish as to what position the Association should take upon any matter, or that it dealt with the Association other than at arm's length. There is no showing that these contributions in anywise resulted in any domination or interference with the administration of the E. M. A., and as they ceased nearly three years prior to the filing of the charges here, we cannot see that they can be a basis for an order to cease and desist, much less an order of disestablishment of the E. M. A. and the vitiation of respondent's contracts with it.

The Trial Examiner did not find, but very properly failed to find, that the act of respondent in acting as a collection agent for the E.M.A. under its contracts with owners of the vending machines constituted financial contributions from the respondent to the E.M.A., although he does find that by so acting the respondent acted as "fiscal agent" for the Association and thereby supported it [R. 41, 53]. It must be admitted that from a hypertechnical standpoint respondent was acting as a "fiscal agent" for the Association, for admittedly it did handle money which belonged to the Association. This, however, did not amount to support of the union, for the evidence does not show that respondent was called upon or did anything towards collecting amounts due to the

union, or auditing statements of the vendors, or that it did anything other than set up an account on its books to show the amount it had received from the vendors and for which it was therefore indebted to the Association. This support was no greater than if respondent had received the Association's mail and caused it to be distributed to the proper officers of the Association. Respondent had no control and exercised no function in connection with the amount of the commissions to be paid by vendors, or the payment by vendors of any amount which might be due from them to the Association, nor did it take any part in seeing that the machines were kept in operation.

The operation of vending machines and of the milk box were all a part of one operation by the Association. Can it be said that the fact that the Association operated one part of the venture at a loss and the other at a profit resulted in financial support to the Association by respondent? The whole transaction shows nothing but a friendly act on the part of respondent towards its employees, and it has been repeatedly held that such acts are not prohibited by the Act.

We have examined every decision by the Board and by the courts which we find cited and which involve the receipt by a union of financial support of the character shown by the record here. In none of them do we find a union ordered disestablished solely on the basis of this one fact, and the Board here consistently holds that this act alone is not sufficient to support its order.

Petitioner in its brief cites *Budd Mfg. Co. v. National Labor Relations Board* (C. C. A. 3), 138 F. (2d) 86 (Br. p. 17) in support of its position that the facts here support the Board's order of disestablishment of the Association. The facts of that case entirely distinguish it from the case at bar. In the cited case the association had been formed by the united efforts of the employer and the employees. The association had no dues and "could not have continued to exist had the Budd Company withdrawn its support." The petitioner for a time paid the officers of the association and after direct payment ceased permitted them to give as much of their time as was necessary to the business of the association without loss of pay. In the case at bar, as we have repeatedly shown. respondent had no part in the formation of the Association, nor did it attempt to interfere or influence its employees in the choice of a bargaining agent, and in the case at bar the officers of the Association were paid for any time given to its business by the Association [R. 398-399].

Assuming that respondent's contribution to the 1938 picnic and the receipt by the Association from the vendors of commissions from the sales of soft drinks, cigarettes and candy, constituted support of the Association, still the Board has found that this fact, standing alone, does not support its finding of Company domination of the Association and, therefore, does not support its order. We have heretofore shown that there is no evidence of any other interference by respondent in the affairs of the Association or in the choice by its employees of a bargaining agent, but that on the contrary the evidence shows en-

tire neutrality and impartiality on the part of respondent, without any discrimination against the Union. Therefore, if we assume that the evidence does sustain the finding of support, but does not sustain the other findings as to interference and domination, it must follow under the very terms of the Board's order that the probative facts found by and relied upon by the Board do not support the ultimate fact found by it, that the Association is Company dominated, and its findings therefore do not support its order that the Association be disestablished and respondent's contract with the Association vitiated.

The Order Is Too Broad in its Scope and Exceeds the Powers Granted the Board.

We believe we have shown that the Board's order lacks substantial support in the record, that it is in violation of the Appropriation Acts, and that its petition for enforcement should be denied and its order set aside in its entirety.

If, however, this court should not agree with us, and should believe that the order as to disestablishment of the Association and the vitiation of respondent's contracts with the Association is supported by findings based upon substantial evidence, and does not contravene the Appropriation Acts, we think it must still find that the scope of the order exceeds the Board's power, in that, it orders respondent to cease and desist from dominating or interfering with the formation of any labor organization [R. 95], and to cease and desist from:

> "(d) In any other manner interfering with, restraining, or coercing its employees in the exercise

> of the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." [R. 96.]

We have shown that there is no evidence whatsoever that respondent took any part in the formation of the Association, and that the finding that it violated Section 8(2) of the Act by so doing is wholly unwarranted. There is, therefore, no basis for an order that respondent cease and desist from such an act. If this order is permitted to stand and the Association should be completely disestablished, but the employees should, in the exercise of the rights granted them by the Act, again choose to form an independent union rather than affiliate with an outside union, and some leadmen should take a part in that activity, respondent would most likely be forced to try the question as to whether the leadmen's activities were its activities on a contempt charge before this court, despite the fact that there is no evidence to support the charge that it has heretofore been guilty of such a charge. This would render the Act penal rather than remedial in its effect.

In the present proceeding respondent was not only charged with violating the rights granted to its employees under Section 7 of the Act by dominating and interfering with the Association in violation of Section 8(2), but was charged with violating those rights through discriminatory discharges in violation of Section 8(3) [R. 8],

and with interfering with the employees in the exercise of the rights granted to them by Section 7 by discriminating against the Union and threatening its employees with certain economic sanctions and the elimination of certain privileges [R. 9].

The Board has found that there is no substantial evidence to uphold the charges that respondent has been guilty of unfair labor practices within the meaning of either Section 8(3) or 8(1) of the Act, that is to say, it has held that there is no evidence to uphold the allegations of either paragraphs 8 and 9 of the complaint, which allege unfair labor practices within the meaning of Section 8(3) of the Act, or paragraphs 10 and 11 of the complaint, which allege unfair labor practices within the meaning of Section 8(1) of the Act. Yet by paragraph 1(d) of the order [R. 96], respondent is ordered to cease and desist from in any manner interfering with, restraining or coercing its employees in the exercise of the rights granted them under Section 7 of the Act, and this, of course, includes desisting from unfair labor practices within the meaning of Section 3 (discriminatory discharges) or unfair labor practices within the meaning of Section 8(1) of the Act, of neither of which acts has respondent been found guilty.

If this court should order enforcement of the Board's order as it now stands, and at a future date respondent should discharge a member of the complaining union, the Board could, and very likely would, hail respondent before this court on a charge of contempt. Other examples of the manner in which the order as it now stands could be used to try respondent for a contempt because of acts

wholly unrelated to the acts upon which the present order is based could be given without number, but we think that the one example we have given is sufficient to show that the present order contravenes the power of the Board as defined in *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, 61 S. Ct. 693, and from a practical viewpoint would illegally restrain respondent in the free exercise of its right to choose whom it will employ, so long as it does not exercise this right to coerce its employees in the exercise of their rights under the Act. As we have pointed out, respondent has wholly converted its plant from the peacetime production of radios and refrigerators to the manufacture of war materials, and has increased the number of its employees from a maximum seasonal employment of 300 to a continuous employment of more than 500. When the time comes for reconversion of the plant, respondent will of necessity be forced to cut down its production forces, at least for a time. In cutting down its force respondent will have the right to choose to retain certain employees and discharge others, and to base its decision as to whom shall be retained and whom discharged on its judgment as to their capabilities and efficiency and to give effect to their length of service with respondent. It cannot properly or freely do this if it is to be faced with the threat of being charged with contempt of this court if it discharges a member of an affiliated union and retains an employee who is not a member of such a union.

Conclusion

In conclusion we respectfully submit that the Board's order, in so far as it orders disestablishment of the Association and the vitiation of respondent's contracts with the Association, was made in violation of the Appropriation Act of 1944 and was beyond the power of the Board to make; and that the Board is without power to enforce that order under the Appropriation Act of 1945, and comes into this court with unclean hands in seeking the enforcement of its order; that the order of the Board is not supported by substantial evidence, and enforcement thereof should be refused and it should be set aside. But, if any part of the Board's order is supported by the evidence, the scope of the Board's order goes beyond the power of the Board, and therefore the scope should be limited by the decree of this court.

Respectfully submitted,

PAUL NOURSE,
Attorney for Respondent.

APPENDIX A

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 452, 29 U. S. C., Sec. 157, *et seq.*):

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

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Sec. 9(c). Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

APPENDIX B

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-40648 April 20, 1944

Chairman,

National Labor Relations Board.

My dear Mr. Millis:

There has been considered your letter of March 8, 1944, in which you refer to the so-called "rider" to the current appropriation for the National Labor Relations Board contained in the Labor-Federal Security Appropriation Act, 1944, approved July 12, 1943, Public Law 135, which provides:

"No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed. *Provided,* That, hereafter notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested persons."

By decision of July 29, 1943, B-35803, it was held that the above-quoted provision limits the use of the Board's funds to those cases in which *charges* have been filed with the Board within three months of the execution of a labor agreement, but prescribes no limitation as to the time within which a *complaint* may be issued

by the Board. In decision of October 21, 1943, 23 Comp. Gen. 293, it was held that said appropriation is not available for use in connection with complaint cases involving violations of section 8 (2) of the National Labor Relations Act unless charges have been filed with the Board within three months from the execution of an existing agreement between management and labor.

You set forth various factual situations and the tentative conclusions reached by the Board concerning the application thereto of the above-quoted provision of law, and request decision of this office as to the correctness of those conclusions. The said cases and suggested conclusions will be considered and commented upon in the order presented in your letter.

"Case 1. Union A starts to organize the employees of the X Manufacturing Company with a view to becoming their bargaining representative under Section 9 (a) of the Act. The Company, not wishing to deal with Union A, calls in a business agent of Union B and signs a closed-shop agreement with that organization, although it knows that it represents only a small minority of its employees. Jones, an employee who has been active in promoting the cause of Union A, refuses to join Union B and 4 months later he is discharged. He files a charge on the next day.

"*Answer:* In the absence of the limitation in the Appropriations Act, the Board would have jurisdiction to hold his discharge a violation of Section 8 (3) since it discouraged membership in one labor organization and encouraged membership in another. Moreover, although the proviso to Section 8 (3) recognizes closed-shop agree-

ments, the agreement in this case would not be a defense since it was not made with a representative designated by the majority of the employees in the appropriate bargaining unit. Under the Appropriations Act, however, the Board would have no jurisdiction since the charge was not filed until after three months subsequent to the execution of the contract. It is true that the particular unfair labor practice of which Jones complained occurred just the day before the charge was filed, but to deem this a violation of the Act would necessitate passing upon the legality of the closed-shop contract.

"Case 2. Union A starts to organize the employees of the X Manufacturing Company with a view to becoming their bargaining representative under Section 9 (a) of the Act. The Company warns its employees not to join Union A, but invites Union B to send organizers into its plant, solicit for membership among its employees, and instructs its foremen to tell employees to join Union B. Union B obtains applications for membership from a majority of the employees and a closed-shop agreement is executed between this organization and the Company. Four months after the agreement is signed, Union A files a charge alleging that the Company has interfered with the right of its employees to self-organization and the right to engage in concerted activities. The charge does not mention the closed-shop agreement.

"*Answer:* In the absence of the limitation in the Appropriations Act, the Board would have jurisdiction to deem the Company in violation of Section 8 (1). Moreover, had the charge been broadened to include a violation

of Section 8 (3), the closed-shop agreement would not have been a defense, since it was executed with an 'assisted' organization. But it is our view, however, that the Appropriations Act would prohibit taking jurisdiction even on the basis of the 8 (1) charge since it indirectly places in issue the legality of the agreement with Union B to the same extent as would a charge alleging domination and support of Union B under Section 8 (2) of the Act. As the Comptroller General stated in his opinion of October 21, 1943, B-37051, 'it cannot be said that Congress intended to restrict its [the Appropriations Act's] application to those cases where the agreement is directly attacked; nor, as a matter of fact, does it appear that the Congress even considered the extent to which the validity of the agreement must be in issue in a complaint case.' The Board's customary remedy in cases such as the instant one is to direct the Company to cease recognizing Union B until it shall have been certified by the Board and to cease giving effect to the agreement with it.[3] The direct result of such an order is the abrogation of the existing agreement to the same extent as a disestablishment order in an 8 (2) case.

"Case 3 (a). In order to forestall the organizational efforts of Union A, X Manufacturing Company tells its foreman to persuade the employees to form an organization known as Union B to which it contributes money. It then recognizes Union B as the bargaining agent and signs a contract with it. Four months later Union A files a charge alleging a violation of Section 8 (2).

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[3]See, for example, *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72; *N. L. R. B .v. Electric Vacuum Cleaner Co.*, 315 U. S. 685; *N. L. R. B. v. Fiss Corporaton*, 136 F. (2d) 990 (C. C. A. 3).

"Answer: In the absence of the Appropriations Act, the Board on these facts would deem the actions of the company a violation of Section 8 (2). Upon this finding it would issue an order forbidding the company to recognize the dominated organization as the bargaining agent which would mean ceasing to give effect to the contract. Since such a proceeding, however, would necessarily abrogate the contract, the Board would regard this case as coming within the prohibition of the Appropriations Act. The opinion of the Comptroller General of October 21, 1943 (B-37051) is broad enough to cover all cases where the charge against a 'dominated' union is filed more than 3 months after an agreement is signed with such an organization."

Since it appears that in the cases cited there was a failure to file charges within the three months' period fixed by the provision of law involved, and that the assumption of jurisdiction by the Board necessarily would result in the abrogation of existing agreements, I concur in your view that the appropriation would not be available for use in connection with complaint cases of the nature indicated.

"Case 3 (b). In order to forestall the organizational efforts of Union A, X Manufacturing Company tells its foremen to persuade the employees to form an organization known as Union B to which it contributes money. It then recognizes Union B as the bargaining agent and signs a contract with it. A year elapses without any charge being filed. At the end of that time the contract, which by its express terms was of a year's duration, expires. The Company signs another contract with Union

B. Within a month of its execution Union A files a charge alleging a violation of Section 8 (2).

"*Answer:* Under these circumstances the Board would have jurisdiction to find a violation of Section 8 (2), order disestablishment of Union B, and the abrogation of the new contract. It is submitted that the Appropriations Act does not operate as a bar. It is true that the period of limitations prevents any attack on the first contract but upon the expiration of the contract the Appropriations Act no longer bars a complaint directed at the nature of the labor organization. The second contract is not immune since the charge was filed within a month of its inception.

Since, in this case,it is clear from your factual statement that the second contract is a new agreement—separate and distinct from the original contract—and as the charges were filed within three months following its execution, it appears they timely were filed and, such being the case, complaint proceedings by the Board are not prohibited by the "rider" in the appropriation act.

"Case 3 (c). The same facts as 3 (b) except that Union A files its charge of a violation of Section 8 (2) 11 months after the date of the first agreement and 1 month preceding its expiration. Upon the expiration date, the company signs another agreement with Union B.

"*Answer:* If the conclusion with respect to Case 3 (b) is sound the reasoning on which it was based also disposes of this case. It is true that the charge was filed too late under the Appropriations Act to permit any proceeding involving the first contract. But since this contract expired shortly after the charge was filed, the employer

signed the second contract with notice of the fact that the legality of the labor organization involved had been drawn into question. Moreover, since the charge preceded the new contract it cannot be claimed that the Appropriations Act is applicable to any new contractual relationship with Union B."

Your suggested answer appears to be based on the view that once charges involving a particular contract are filed—whether timely or not—the three months' period stipulated in the "rider" is no longer operative so far as concerns new agreements of a similar nature that subsequently may be entered into. With that view however, I cannot agree. Since the charges in this case were filed more than three months following the execution of the first agreement, obviously they were of no force or effect during the life of that agreement; and I find no substantial basis for holding that the execution of the second agreement automatically revived said charges. As the charges were not for consideration when filed, the situation, in so far as the "rider" is concerned, would appear to be the same as if no charges had been filed. Moreover, the excerpts from the debates on the "rider" set forth at length in the decisions of July 29 and October 21, 1943, *supra,* clearly evidence the intention of the Congress that existing agreements be preserved unless charges are filed within three months after such agreements are entered into. Hence, the determining factor as to whether the Board may assume jurisdiction is the time of the filing of the charges as it relates to the date of the execution of the agreement affected. It would seem to follow as a logical consequence that an existing agreement may be abrogated only upon the timely filing of charges arising

out of that particular agreement. Since, in the present matter, the charges referred to were filed prior to the execution of the second agreement, it must be held that unless there was a new filing of charges after the execution of the agreement and before it had been in existence three months, the appropriation would not be available for use in connection with a complaint case arising over such agreement.

"Case 4 (a). The facts are the same as in case 3 (a) *supra,* except that the contract with Union B was executed on January 1 and contains a clause which provides that it shall remain in force until December 31 and from year to year thereafter, subject to termination or modification by either party on 30 days' written notice prior to December 31. The year elapses without either party giving notice of termination or modification. One month later, a charge of a violation of Section 8 (2) is filed by Union A.

"*Answer:* The question whether or not the Board has jurisdiction to entertain this charge under the Appropriations Act depends upon whether the contract is deemed to have been in effect for 13 months or for 1 month. To answer this question resort must be had to the common law of contracts. It is submitted that the failure to give notice created a new agreement which was not 'in existence for 3 months or longer without complaint being filed.' As the Supreme Court of Michigan stated in an analogous situation, 'it is very clear that all such contracts must be mutual, and that where a right is reserved to a party to renew or dissolve an obligation, the determination of such party to renew an expired

contract, if accepted by the other, makes an original contract.'[4] In the instant case, the obligation of the parties came to an end at the expiration of the period over which the original agreement extended, and it was only by the concurrence of the will of both parties that the obligation could be continued. The employer and the labor organization had the right, mutually reserved to them, to renew or dissolve the obligation. The concurrence of wills required to renew the obligation was manifested by an exchange of promises by both parties to enter into a new agreement containing the same terms as the pre-existing agreement. This exchange of promises was evidenced by the conduct of both parties in failing to give notice of modification or termination of the original agreement.[5] Viewed as a statute of limitations, the running of the 3-month period was revived when the new agreement came into existence.[6] Within that 3-month period, a charge was filed affecting the new agreement."

As you suggest, the question here involved is whether the failure of either party to give notice of termination of the agreement results in the continuation or extension thereof, or in the making of a new agreement. If the latter be true, the charges timely were filed and the exercise of jurisdiction by the Board in the case would be proper. An examination of the authorities discloses no

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[4]*Brady v. Northwestern Insurance Company*, 11 Mich. 425, 443-444; see also *Jenkins v. Covenant Mutual Life Insurance Co.*, 171 Mo. 375, 71 S. W. 688, 690; *Hartford Fire Insurance Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115.

[5]It is, of course, immaterial that the exchange of promises was evidenced by negative conduct. *Restatement of the Law of Contracts*, Section 21.

[6]It is elementary that a debt or other obligation, barred by a statute of limitations, is revived by a new promise. *Alexandria v. Clarke*, 2 F. Case No. 844.

analogous precedents other than landlord and tenant cases which deal with the question as to whether the effect of an option clause in a lease is to create a new term or to continue the old one. However, those cases appear to be in such irreconcilable conflict as to be of little or no value in reaching a proper determination of the question here involved.

The complicated and conflicting rules in the various jurisdictions, for determining whether a new term commences upon the exercise of, or failure to exercise, an option clause in a lease are set forth in detail in III Thompson, Real Property (1940), sections 1264-1276, and I Tiffany, Landlord and Tenant (1910), section 219. Briefly, as those authorities state, the question of whether the operation of an option clause results in the commencement of a new term, or the continuance of the old, for specific purposes, depends upon the particular words used in the clause and the intention of the parties. In some states, the option is held to call for the execution of a new lease and, therefore, that a new term must commence (III Thompson, *supra,* sections 1264, 1266: "An option to renew does not create a present demise of the additional term but amounts to no more than a covenant to grant the term"). Moreover, even in those cases and jurisdictions where a new lease is not required there is a conflict as to whether a new term commences, or whether the old one continues, by virtue of the operation of the option clause (I Tiffany, *supra,* sections 219, 224; III Thompson, *supra,* section 1264:

"A distinction between a stipulation to renew a lease and one to extend it for an additional period beyond the

original term is usually made. The former usually requires the execution of a new lease, while the latter does not. * * * Covenants for extension of leases have been construed in two different senses. The first is that the leasehold estate is measured by the sum of two terms, with an option in the lessee to terminate it at the end of the first-named term. The second theory is that under such a covenant two estates are created in the lessee, one commencing at the termination of the other at the election of the lessee").

Some of the varying purposes for which particular option clauses have been held either to result in a new term, or in a continuance of the original term are summarized in I Tiffany, Landlord and Tenant (1910), section 219, as follows:

"In a number of cases the question has arisen whether a lease for a certain term, with a right of renewal for another term, was a lease for the sum of two terms, for the purpose of determining whether it was within the operation of a particular statute. It has been decided, for the purpose of determining the applicability of a statute restricting the period for which a lease can be made, that the lease is invalid if the sum of the original term and of the renewal term exceeds the period named in the statute, and a like view has occasionally, though not always, been asserted in determining the applicability of the Statute of Frauds. Likewise such a lease has been regarded as within a recording act which purports to cover leases for a period longer than the original term.

"A statutory provision that a tenant under a lease for less than a period named should have a right to purchase

the reversion has been held to apply to a lease for a shorter period than that named, when there was a right of renewal which might extend the holding beyond that period. And, conversely, a prohibition of the assignment of a lease of less than a certain period has been held not to apply when there was such a right of renewal. In one state, on the other hand, the view has been taken that the period for which a renewal could be obtained should not be added to that of the original term for the purpose of making up a term of five years within the statute allowing a redemption, under the summary proceeding statute, in the case of such a term.

"Where a privilege of extension, as distinct from a right of renewal is given, since the lease creates both the original term and the period of the extension, the lease would seem to be invalid if it is oral merely, and the sum of the two periods exceeds the limits imposed by the Statute of Frauds, even though the first term named is within those limits. There are decisions to that effect, but the contrary view has also been taken."

You refer to the case of *Brady v. Northwestern Insurance Company,* 11 Mich. 425, as involving an analogous situation. The following quotation from that case contains the statement of the facts involved and that portion of the opinion which is deemed relevant here:

"The plaintiff in this case was insured by the defendants in the sum of two thousand dollars, upon his warehouse, on the first day of January, 1856, for one year. The policy of insurance contained, among others, this provision: 'This insurance (the risk not being changed) may be continued for such further time as shall be agreed on;

the premium therefor being paid and indorsed on this policy, or a receipt given for the same.' The obligation of the defendants seems to have been renewed every succeeding year, under this stipulation; and upon such renewed obligation, dating from the first day of January, 1861, this action arises.

"Between the years 1856 and 1861, certain ordinances were adopted by the common council of Detroit, for preventing the restoration or reconstruction, within certain boundaries, of wood buildings which might be injured or destroyed by fire. After the passing of these ordinances, the policy was renewed on payment of the premium originally stipulated, and after being countersigned by the resident agent. The question now presented is whether the liability of the defendant is under the promise of 1856 or that of 1861; in other words, was the undertaking of 1856 made a continuous undertaking, to be construed by the laws and ordinances as they existed in 1856 solely, or, by the renewal, were the parties bound by the laws and ordinances existing at the time of such renewal?

"We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and was optional with both parties. *At the expiration of the year over which the original policy extended, the obligation of the insurer was ended, and it was only the concurrence of the will of both parties that the obligation could be continued.* This concurrence is manifested by the payment of a consideration by the one party, and a renewed promise by the other; and an obligation revived or continued under such circumstances, is an original obligation. It must be asked for by the one, and may be assumed or

refused by the other; and the policy, which is its evidence, is therefore only continued by the positive act of both parties. This is according to the terms of the policy and of the certificate of renewal; and the fact that the insurance company, by the very terms of the certificate of renewal, required payment therefor, and that such certificate should be countersigned by the resident agent before it should become operative, shows that the company regard the renewal as a new contract, made at their option, and dependent in some degree upon the judgment and knowledge of such agent. Thus, if the agent should find the property depreciated in value, or the risk increased from any cause, he could refuse to countersign the renewal receipt, and the promise by the company to renew the policy would be thereby terminated. Now, it is very clear that all such contracts must be mutual, and that where a right is reserved to a party to renew or dissolve an obligation, the determination of such party *to renew an expired contract,* if accepted by the other, makes an original contract." (Italics supplied.)

It is believed that the above cited case is readily distinguishable from the present matter, since by its terms the agreement there involved was to be in effect for but one year and contemplated the making of a new agreement upon its expiration if the parties so desired. The salient factor to be observed is that upon the conclusion of the term covered by the policy it became, as the court stated, an "expired" contract. Hence, any renewal thereof necessarily would result in the entering into of an original contract.

By letter dated March 10, 1944, the General Counsel of the National Labor Relations Board directed attention to the case of *Patrick Cudahy Family Co. v. Bowles,* 138 F. 2d 574, as supporting the views of the Board with respect to the instant question. In that case a landlord filed a petition with the Office of Price Administration for an increase in maximum rent as permitted by section 5(a)(5) of Maximum Rent Regulation No. 35, as amended by Supplementary Amendment No. 9, in those instances where: "There was in force on March 1, 1942, a written lease, for a term commencing on or prior to March 1, 1941, requiring a rent substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1942." The lease involved was executed on January 16, 1939, and covered a two-year term beginning May 1, 1939, and ending April 30, 1941, it being provided that "this lease shall stand, without notice from either party, renewed on identical terms for a like successive period unless either party shall at least sixty days before the expiration of the demised period notify the other party in writing to the contrary." Neither party gave the notice provided for and the tenant was still in possession of the premises, under the agreement, on March 1, 1942. The landlord contended that the whole period of occupancy under the agreement comprised but a single term commencing May 1, 1939, and, hence, that there "was in force on March 1, 1942, a written lease, for a term commencing on or prior to March 1, 1941." The Price Administrator contended that the term of the lease in force on the maximum rent date did not commence until May 1, 1941.

The court agreed with the Price Administrator, holding as follows:

"The original term ran from May 1, 1939, through April 30, 1941. A renewal of the lease for a further two-year period could be made only by mutual assent. In the original rental agreement executed January 16, 1939, the parties each agreed that such further assent would be evidenced by silence, i.e., by failure to give notice to the contrary at least sixty days before the expiration of the original demised period. *When the last day for giving such notice expired, without either party having done so, they in effect bargained for an additional two-year term running from May 1, 1941, through April 30, 1943.* We agree with the Administrator that the adjustment provision should have throughout the country a uniform interpretation conformable to the purposes of the rent regulation, irrespective of whether, under the law of a particular state, the effect of the renewal clause would be to create a new term or to continue the old within the meaning of a local statute of frauds or recording act. It is recognized, of course, that matters concerning the title and disposition of real estate are determined by the law of the jurisdiction in which such property is located; but here the matter at issue concerns the interpretation of a regulation issued by a federal administrative agency. * * *"

While there would appear to be a superficial analogy between the case just referred to and the factual situation here considered, yet ,for reasons hereinafter stated, it is not believed that the *Cudahy case* is controlling. At the outset it will be observed that the court's decision—in ap-

parent recognition of the conflict in the pertinent decisions hereinabove referred to—stemmed from its desire to give the adjustment provision a uniform interpretation throughout the country, regardless of the law of the particular State relating to the effect of the renewal clause. It will be noted, also, that the OPA regulation emphasizes the date of the commencement of the term and not the date of the execution of the lease. In that connection, the court held that upon the expiration of the period of notice specified in the agreement the parties bargained for an additional two-year term; but the court did not hold that the parties entered into a new lease, nor does it indicate that the execution of a new lease was deemed necessary. That question was not before the court; the question for determination was whether the further period of occupancy by the tenant constituted a part of the original term or was a new and additional term. Under these circumstances, there is room for the view that the court held, in effect, that the *lease* was extended or continued to cover an additional term. But, however that may be, the labor agreement to which you refer is, by its terms, to remain in force not only for one year but "from year to year thereafter." The fact that it may be terminated or modified by the communication of notice by either party 30 days prior to its anniversary date does not compel the view that the parties contemplated a new agreement at the end of each year. On the contrary, the proper view would appear to be that the contract is one which, by the force of its provisions, is to be continued or extended indefinitely, so long as the notice of termination prescribed therein is not given. While the matter is not free from doubt, yet, since the clear intention of the Congress in

enacting the "rider" was to leave undisturbed *existing* agreements (see 23 Comp. Gen. 293, *supra*), it would seem inappropriate to indulge in technical legal refinements for the purpose of construing the extension of the contract as the making of an original agreement. Therefore, I am constrained to hold that in this case there is a continuation or extension of the agreement and, the charges not having been timely filed, that the appropriation is not available for use in connection therewith.

"Case 4 (b). Facts same as Case 4 (a), except that the charge is filed 31 days before the expiration of the first contract, i.e., on the day preceding the beginning of the 30-day notice period.

"*Answer:* If the answer to Case 4 (a) is sound, it is submitted that the Appropriations Act does not bar the Board from entertaining this charge since it was filed in time to put the company on notice that if it permitted the automatic renewal clause to go into effect it would be doing so in the face of a complaint with respect to the nature of Union B. In other words the problem presented here is the same as 3 (c) *supra.*

"Case 4 (c). The X Manufacturing Company signs a contract with Union A which represents a majority of the employees. This contract contains the same clause which is set forth in Case 4 (a). Prior to the 30-day notice period Union B, a rival labor organization, files with the Board a petition to determine the exclusive bargaining representative pursuant to Section 9 of the Act. The 30-day notice period then expires without either party giving notice of termination or modification of the contract. Two months after the expiration of the 30-day

notice period, the representation proceeding results in the certification by the Board of Union B as the exclusive bargaining representative under Section 9 (a) of the Act. Two months after this certification Union B files a charge affecting the contract.

"*Answer:* In the absence of the Appropriations Act the Board, on these facts, would find that the second contract was illegal because it was continued in effect after the Board had certified a different bargaining agency, and the Board would order it set aside. Whether or not the Appropriations Act prohibits the Board from taking jurisdiction in this situation depends on whether the 3-month period of limitation should be deemed to run from the date of the second contract or from the date of the certification. If the answer to Case 4 (a) is sound, it may be argued on the one hand that the 3-month period of limitations begins to run from the date of certification because the second agreement was originally lawful and did not become subject to attack until it was treated as operative in the face of the certification of a different representative; on the other hand, it may be argued that the 3-month period begins to run from the date of the second agreement because the agreement was in existence during that entire period."

In view of the conclusion reached in case 4(a), above, it must be held that the charges were not filed in time in either of these situations and that the "rider" would preclude the use of the appropriation in connection with a complaint by the Board in such cases.

"Case 5. In order to forestall the organizational efforts of Union A, X Manufacturing Company tells its

foremen to persuade the employees to form an organization known as Union B to which it contributes money. It then recognizes Union B as the bargaining agent and signs a contract with it. One month before the expiration of this contract a charge alleging violation of Section 8 (2) is filed. The officers of Union B thereupon hold a meeting, form a successor organization called Union C, and inform the membership of Union B that this organization is to be dissolved but that Union C is its successor. The assets and liabilities of Union B are thereupon transferred to Union C. At the expiration of the contract with Union B, the company signs a contract with Union C.

"*Answer:* In the absence of the limitation on the Appropriations Act, the Board would have jurisdiction to find not only that the formation of Union B was a violation of Section 8 (2), but also that Union C was a dominated organization ,since it was the outgrowth or product of Union B. It is well established that in the absence of a clear line of cleavage between the two organizations the successor union is but the continuation or *alter ego* of the predecessor.[7] It is submitted that if the answer to Case 3 (c) is sound, the limitation in the Appropriations Act does not deprive the Board of jurisdiction in this situation. In other words, the original charge pending at the time of the execution of the agreement with the successor organization applies to Union C and to the agreement executed with it with the same force as if Union B had re-

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[7]See for example, *N. L. R. B. v. Newport News Shipbuilding and Dry Dock Corp.*, 308 U. S. 241; *N. L. R. B. v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50; *Westinghouse Electric & Mfg. Co.*, 112 F. (2d) 657 (C. C. A. 2), affirmed 312 U. S. 660; *Sperry Gyroscope Co. v. N. L. R. B.*, 129 F. (2d) 922 (C. C. A. 2); *N. L. R. B. v. Condenser Corp.*, 128 F. (2d) 67 (C. C. A. 3); *Colorado Fuel & Iron Corp. v. N. L. R. B.*, 121 F. (2d) 165 (C. C. A. 10).

mained in existence and was the signatory to the second contract. Under this view of the case, the analogy to case 3 (c) *supra* is clear."

As the basic question here is identical to that involved in case 3(c), *supra,* the conclusion reached therein is equally applicable in this case.

"*Case 6.* In order to forestall the organizational efforts of Union A, X Manufacturing Company tells its foremen to persuade the employees to form an organization known as Union B, to which it contributes money. It then recognizes Union B as the bargaining agent and signs a contract with it. One month after the execution of this contract, Union A files a charge alleging a violation of Section 8 (2). Thereafter, Union A is permitted to withdraw its charge, without prejudice, so that a consent election may be conducted with Unions A and B on the ballot. Union A loses the election. The Company then continues to give effect to its contract with Union B and to contribute money to it. Four months after the execution of this contract, Union A again files its charge alleging a violation of Section 8 (2).

"*Answer:* In the absence of the Appropriations Act, the Board on these facts would deem the actions of the Company a violation of Section 8 (2) of the Act. It is our view that the limitation in the Appropriations Act would probably prohibit the Board from taking jurisdiction in this situation on the analogy to the proposition that a suit voluntarily withdrawn does not toll a statute of limitations. However, it may be argued that the literal language of the Appropriations Act has been satisfied since the contract was once made the subject of a charge

at a time when it had been in existence less than three months."

Inasmuch as the "rider" must be accepted as establishing a period of limitations, it would seem necessary that in this case there be applied the established doctrine that a suit voluntarily withdrawn cannot be availed of in a subsequent action so as to arrest the running of a statute of limitations. Accordingly, I agree with the view that the Board is precluded from using the appropriation to take jurisdiction in this case.

"Case 7. Union A is certified by the Board as the duly chosen bargaining representative of the employees of the X Manufacturing Company. Union A then requests the Company to bargain with it with respect to wages, hours and working conditions. The Company refuses and, instead, signs a closed-shop contract with Union B, a rival labor organization, which represents a small minority of the employees. Four months after the execution of this contract, Union A files a charge alleging a violation of Section 8 (5).

"*Answer:* In the absence of the Appropriations Act, the Board on these facts would deem the actions of the Company a violation of Section 8 (5), because Union A, being the representative of a majority of the employees in the appropriate bargaining unit, was *exclusively* entitled, under Section 9 (a), to act as the bargaining agent, and the company's refusal to recognize it was an unfair labor practice. In such cases the remedial order of the Board would direct the company to bargain exclusively with Union A. This would necessarily mean that the company could no longer give effect to its contract with

Union B. Under the limitation in the Appropriations Act, we therefore deem the Board without jurisdiction in this case, since such a proceeding would indirectly invalidate the agreement with Union B which was in effect for 3 months without a charge being filed."

For the reasons stated in your answer, *supra,* I agree that the restriction on the use of the appropriation precludes the Board from taking jurisdiction in this case.

"Case 8. Union A is certified by the Board as the duly chosen bargaining representative of the X Manufacturing Company. Union A then requests the Company to bargain with it with respect to wages, hours, and working conditions. The Company refuses and Union A files a charge alleging a violation of Section 8 (5). Immediately after the filing of the charge, the Company signs a closed-shop contract with Union B, a rival labor organization, which represents a small minority of the employees. Four months later employee Jones is discharged for refusing to join Union B. The next day the 8 (5) charge is amended to include a violation of Section 8 (3). The Company contends that the Board is without jurisdiction to hear evidence on the alleged violation of Section 8 (3) since this would put into issue the validity of the closed-shop contract—a contract which had been in effect for more than 3 months before a complaint of a discriminatory discharge was made.

"*Answer:* In the absence of the limitation in the Appropriations Act, the Board would have jurisdiction to deem the Company in violation of Section 8 (5) and of Section 8 (3). The closed-shop agreement would not be a defence, not only because Union B represented less than

a majority, but also because this contract was made at a time when the company had a duty under Section 8 (5) to bargain only with Union A. It is clear that the limitation in the Appropriations Act would not bar the Board from taking jurisdiction of the 8 (5) charge since it was filed before the closed-shop agreement was executed. In other words, the agreement would not be a defence. It is submitted that the Appropriations Act does not deprive the Board of jurisdiction over the amended charge of a violation of Section 8 (3) since the contract which the Company cites in its defence was made when it was already on notice of the exclusive bargaining status of another labor organization.

"As pointed out by the Comptroller General in his opinion of October 21, 1943, B-37051, the limitation in the Appropriations Act was directed to the use of the Board's funds in making existing contracts the subject of inquiry in complaint cases, 'regardless of the nature of the unfair labor practices that may be in issue in a particular case.' The purpose of Congress was, not to immunize unfair labor practices as such from the remedial processes of the Board but, to preserve *existing contracts* in cases in which timely charges were not filed. Hence, once a timely charge affecting the contract has been filed, the 3-month period of limitation had been tolled for all purposes in so far as that agreement is concerned, for the reason that the necessary effect of proceeding on one phase of the charge would be to abrogate the agreement for all purposes and in all respects."

It is an unbroken rule of law that an amendment of a pleading which introduces a new or different cause of ac-

tion and makes a new or different demand does not relate back to the beginning of the action, so as to stop the running of a statute of limitations, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed. 37 C. J. 1074; *Union Pacific Railway Company v. Wyler,* 158 U. S. 285; *Miller v. Hamner,* 269 F. 891; *Walker v. Iowa Cent. Ry. Co.,* 241 F. 395. Since, as hereinbefore indicated, the "rider" must be accepted as establishing a period of limitations, no reason is apparent for not applying the cited rule to the present situation. As it is plain that the amendment of the 8(5) charge to include a violation of section 8(3), results in the introduction of a new and additional charge as to which there is placed in issue an agreement which has been in effect for more than three months, I am constrained to hold that the use of the appropriation in connection with any attempt of the Board to assume jurisdiction to hear the section 8(3) charge is not authorized.

Respectfully,

/s/ Lindsay C. Warren

Comptroller General of the United States.